Municipal Law.

Husband & Wife, No. I.

A System
of
Municipal Law,

Comprised in a Course of Lectures,

delivered at Litchfield, in the
State of Connecticut,

By James Gould.

Title of these lectures, & copy of the Record of it – enclosed.

This mark (or ✝) denotes an addition to the text.

This mark (✠) designates a note.

(SS.) Denotes the beginning of a new paragraph, section.

Courts of justice administer only ye laws of the state, by whose authority they are established: But it is a part of ye law of every civilised state, that, in certain cases, ye law of a foreign state is to be taken, as ye rule of decision. (Coop.) (Lex loci)

Began ye course Nov. 2. 1814.
Feb. 27. 1818.
Augt 24. 1821.
Nov. 1. 1822
Jany 3. 1824.
Mar. 21. 1825.
Aug. 11. 1826.
Nov. 22. 1827.
Feb. 28. 1829.
Nature of

July 5. 1830.
Nov. 28. 1831.

Of Municipal Law.

Law in its most general sense what (1 Bla. 38-9) - applied to all kinds of action - Prescribed by some superior.

Law of Nature is the unrevealed law of God - or the will of God as discovered by reason. 1 Bla. 39.

Law of nations is in general the law of nature applied to nations or ~~Sovereign~~ sovereign States. 1 Bl. 43. Vattel Pref. 1. 6. 8

Municipal law, what (1 Bla. 44) - Rule - permanent - uniform & universal - i.e. universal & uniform as far as it extends. (For local usages are law) - In other words, general, not personal, within its own limits. (1 Bla. 44.) By "permanent" is meant "not transitory", as an occasional order or mandate, is - but continuing, either indefinitely, or for a certain period.

Different from contract - the latter is a promise proceeding from us - law is a command directed to us. 1 Bla. 45.

Municipal Law.

Different from natural law. — The latter "a rule of moral conduct" — municipal, of "civil conduct." 1 Bla. 45.

post, 28-9. 2

"Prescribed" — not retroactive — (1 Bla. 45-6 — Difference between retroactive & ex post facto laws. — The latter always penal laws — the former either penal or remedial. 3 Dallas 386. 391. Bull vs Calder, Sup. Ct. U. S. ~~3 Dall. 386.~~

Explanatory, or healing st., not impairing vested rights, are not opposed to prin. of jurisprudence. Con. R. 4 Wheat. 595.

By the supreme power — i.e. the legislative. 1 Bla. 46. 90.

post, 18. Construction of.

Interpretation of laws. — 1st Words to be understood generally, according to their most known, usual & popular signification: — Terms of art according to their acceptation among the learned in the art: ~~1 Bla. 59 60~~ — as common law technics. (19 Vin. 513. 6 Mod. ~~143.~~ 4 Bac. 647. 1, Bla. 59, 60.

+ Contracts, 130. see, Pow. C. 402. 2 Bol. 253.

+ Stat.

2 If words are dubious, context to be consulted — Thus their meaning may be established by their connexion — Preamble often useful. — So to compare the law with other laws relating to the same subject. ~~(1 Bla. 59)~~ 1 Bla. 60. 1 Ves 365 Palm. 485 3 P. W. 185 1 Son. 163 4 Bac 645. Plow. 206. L'Kay. 1028.

post, 33.

Construction

Municipal Law.

3rd (Words always to be understood, as having reference to the subject matter. Ex. purchasing provisions at Rome; ~~(1 Bla. 61)~~ — i.e. nominating to benefices by the Pope. (1 Bla. 63.

4th Effects & consequences of different constructions to be regarded. Ex. "drawing blood" in the streets of Bologna. 1 Bla. 61. 4 Bac. 652. 1 Mod. 344.

5th Reason & spirit of the law consulted — "Cessante ratione" &c — Ex. Law of Rome as to "forsaking a ship in a storm". (1 Bla. 61. Plowd. 232. 4 Bac. 647.

Hence arises what is called the equity of the law — ("the correction of that wherein the law, by reason of its universality, is deficient.") By the equity of a law is meant a construction (or meaning), agreeable to the reason & spirit of it — (19 Vin. 514. 526. Co. L. 24. b. 1 Bla. 62. 3 Bla. 431.) by enlarging, or restraining ye letter of it.

Division of

Division of Municipal law. 1 Lex non scripta — 2. Lex scripta. (1 Bla. 63.

Lex non scripta

I. Lex non scripta. It includes 1st Common law or general customs — 2nd Particular customs —

3

Municipal Law — Lex non scripta

Divisions

3rd particular laws observed only in certain jurisdictions.
1 Bla. 63. 67. — These are all customary laws.

Called unwritten because its original institution is not set down in writing — Derives its authority from immemorial usage; ~~1 Bla. 64. 67.~~ usage, time whereof the memory of man &c.
1 Bla. 64. 5.

Common

1st Common law. — This is a general custom (1 Bla 63. 68.) called "common", either to distinguish it from other laws, as the Stat. civil or canon — or because it is common to the whole realm. — (Mentioned by Edward the Elder after the abolition of provincial customs by Alfred.) (1 Bla. 67. 74.)

Common law, like the other branches of unwritten law, depends, for its support, on immemorial usage — universal reception, "time whereof the memory &c. — A usage, to be immemorial, must in legal theory extend back beyond the time of legal memory. — This is dated in law from the accession of Rich.d I. A.D. 1189.
(1 Bl. 68. 2 Bl. 31. 2 Inst. 238-9 2 Rod. 269. pl. 16 — ~~A.D. 1189.~~

Municipal Law — Lex non scripta

Common

Where is the common law, ~~for any other branch of the unwritten law~~ to be found? — In the records of Cts. of justice - books of reports - judicial decisions - & treatises of the learned. 1 Bla. 63-4. 69. 71.

By whom expounded or ascertained? - By the judges of the Cts. of justice; the depositaries & oracles of the law.

1 Bla 69

However, Records of Cts, reports & judicial decisions are only evidence of what the com. law is; - not the law itself. (1 Bla. 63. 71.) Hence decisions are often overruled, i.e. declared not to be law. (1 Bla. 70.

Precedent is a former judicial decision on the point in question; this therefore, ~~ergo~~, only evidence of what the law is, ~~not improper~~ — to be followed unless flatly absurd or unjust. Not to be overruled merely because the reasons, on which it ~~then~~ stands, are not discovered. — The onus lies upon him who objects to the precedent. (1 Bla. 69. 70.) "Stare decisis", is the most important maxim in the law. "Buller J.

1 East 495.

Treatises of learned jurists constitute another source of evidence of the com. law.

Municipal Law — Lex non scripta

Common.

Qu: Whence did the common law originate? How came it into existence? It was built up, in fact, by Cts of justice — otherwise there would have been no customary law — & of course, a failure of justice. (Cowper 10.) Obj: Sovrign power wanting. Answ: Sanctioned by acquiescence of sovereign power & general usage. — Entire branches made since the time of Richd 1st. Obj: Immemorial usage wanting. Answ: Decisions, in new cases, are evidence of what the law has immemorially been.

The law of nations is recognized by, & adopted as part of the Com. Law. 4 Bla Cm. Black Lr. 70 — 1 Ld. Ch. 192. 230. Park. Ins. 353.

Particular customs.

2nd Particular customs — i.e. Local usages,* (1 Bla. 74. 2 Bl. 263.

These are probably the remains of those provincial customs out of which the common law was first collected by Alfred. (1 Bla. 74.

* Which have the authority of law, within their own limits.

(When to be made a ground of ~~claim~~ demand, or defence),

Regular Qa particular custom, must be specially pleaded. — Its existence, nature shewn, as well as that the thing in question is within it. (Litt. s. 265. Co. L 175. 1 Bl. 74.) For not being a gen.l or gen.l rule, Cts cannot judicially know it.

To be tried by jury, unless before tried, determined & recorded in the same Ct in which the question arises. (1 Bl. 74. Doug 365

Municipal Law. — Lex non scripta.

Particular Customs.

Exception to the above rule in the cases of gavelkind & borough-english customs. — of the existence of these the law takes notice. — Necessary to prove only that the thing in question is within the one or the other. (1 Bla. 76. Co. L. 75.

Law Merchant called a particular custom, (1 Bl. 75) but improperly; not a local usage. — It governs particular transactions throughout the realm — not confined to them; but not to local limits. (3 Bla. 436. 1 Bl. 75. 2 Bl. 459. 461. 467. Ld Ray 175. Chit 13. 2 Lutw 1585. 2 Vent 295. 310. Comb 45. 152.) It is therefore a branch of the common law. Need not be specially pleaded. Sal. 125

a Jury of Merch^ts &c. Sal.

Not tried by jury, — nor proved by witnesses; ~~(Lutw 1215. 1222. 1 Bl. R. 295. 4 T. R. 205. Chit. 109.)~~ — (except in new cases, in which the custom of merchants is doubtful). In such cases evidence of the custom may be received. ~~it is said~~. (Ch. 28. 109.

Burr 1216. 1 Bl. R. 295. Doug. 653. 72-3. 2 Burr. 1215. 1222. 1 T. R. 298. 4 T. R. 205. Chit. Bills, 109.) — ~~Burr. Co. said~~ The ques^n in such cases, ~~how is it goes~~ to the jury, to prove the matter of fact — ~~[illegible]~~ — i.e. ye existence of the custom. + The effect of the fact thing proved, is matter of law, upon wh^ the E^d is to instruct ye jury.

+ Qu: If ye fact consist in a custom, but being [illegible] wrong, [illegible] for ye Court to make ye inquiry, as matter of conscience?

Particular Customs.

Municipal Law — Lex non scripta

As to the legality of customs. — Must have been, 1st Immemorial (1 Bl. 76-7. Co. L. 113) — 2° Continued or uninterrupted; i.e. the right — interruption of the possession only does not destroy it. (1 Bl. 77. Co. L. 114) — 3° Peaceable; acquiesced in: ~~Hence~~ Hence common consent (otherwise implied from immemorial usage) is wanted (1 Bl. 77. Co. L. 114.) — 4th must be reasonable; or rather not unreasonable. (Ex. case of putting beasts into common on a Sunday day.) Good, unless a sufficient reason can be assigned against it. (1 Bl. 77. Co. L. 62. Litt. s. 212 — 5th certain. ex. "descent to the most worthy of one's blood" bad. 1 Bl. 78. 1 Rol. 565.) — 6th Compulsory — to contribute at pleasure" bad. (1 Bl. 78.) — 7th consistent with each other. Two contradictory destroy each other. 1 Bl. 78. 9 Co. 58

Customs in derogation of common law are strictly construed. Ex: Infant, by custom of gavelkind, may, by deed of feoffment, convey in fee simple; but in no other way. (~~1 Bl. 78-9~~) He cannot even lease. (1 Bla. 78-9

Submit to the royal prerogative; as if the king purchase, gavelkind. (1 Bl. 79. Co. L. 15.

+ They construe kind no car, not within their letter; i.e. cannot be extended by construction.

Municipal Law, — Lex non scripta

Particular laws

3rd Certain particular laws, — adopted by custom, & used only in particular courts. Ex. civil & canon — i.e. the civil & ecclesiastical law of the Roman Empire; ~~(Bl. 67, 79, 80, 81, 83)~~ — adopted in the ~~the~~ ecclesiastical military, & maritime courts, ~~the~~ of the University. (Bl. 57, 79, 80, 82-3.

Of ye description is ye maritime law, adopted in our prize courts.

Binding in Eng. by adoption — not on account of any intrinsic authority possessed by them in that kingdom (1 Bl. 79-80) — This adoption may be either by immemorial usage in Cts of justice, or by act of Parl.t — In the former case, they become a part of the unwritten law of Eng.; in the latter, of the written. (1 Bl. 79-80

Eng. & C. d. St. Non-binding law.

+ i.e. we might have rejected ye adopted a right code:

‡ not ye ancient stat. law,

(Dev. 14, 13)

Common & ancient Stat. laws) of Eng. (so far as they are binding in Eng.) derive their authority from a similar sanction. (1 Tuck. Bl. 411-429.) They were not, originally, binding here at all. + But our Cts ought not now to reject the com. law of Eng. except so far as it clearly appears absurd, unjust, or inapplicable to the circumstances of our country. Primâ facie, it binds in all cases — Because it has been, in general, adopted, & acted upon, as our law, by usage & common consent — Our citizens consider it as the rule of their civil conduct. They conduct their civil concerns with reference to it. —

Municipal Law.

What English Stats are prima facie binding here, ~~(I C. 1st~~ cost. 12.

Eng. law, in our forum, only here.

Whether a com. law distinct from that of Eng. can exist in Con.? — 1st So far as that of Eng is inapplicable to our situation we must have a customary law of our own: It's indispensably necessary: otherwise a failure of justice. — Stat law, incapable of affording a single complete remedy, without the aid of ~~a com. law~~ an unwritten law. (Codification)

Besides, ye Stat. Law w^h is only a collection of positive rules, is not broad enough, to reach a vast variety of ca.s to w^h municipal law must extend: + duties of Ex. fact obligat.s, to w^h it is, in strictness, a system of E-thics. (What there enters as Watt. L. N. Prelim. c. 17, or of "written reason.")

When ye com. L. is a connected system of principles, extending to all + ought to,

2d So far as that c. Eng. is absurd, or unjust, we may have rules ~~[illegible]~~ of our own. So far we are not bound to adopt the Eng^h rules; — we ought not. What then is to be done? — No rule in such cases? — When inapplicable to our cont^n, we must have a different rule.

Obj. to both the above prop.s: Immemorial usage wanted. — ~~[illegible]~~ Legal memory. — ans. This Eng^h rule is emphatically inapplicable to our country — merely arbitrary. — This date of legal memory was established only plout 60 years after the accession of Richd I. (2 Bl. 31. n. "astonishing" that it should continue) — Then a custom 60 years old was good. — Why not adopt the rule here, as it originally was, if at all?

Lex Scripta

3. But general consent, & long acquiescence, tho' not immemorial, in the above arbitrary sense, is sufficient. — Necessity. supra. — So settled.

4. Besides, the objection itself is illogical & futile. It assigns no reason against the affirmative of the question; but merely answers it in the negative. — The question is; "Can we have a common law different &c.? — answer. "No. Because it would be different &c. i.e "We cannot, because we cannot." — Petitio principii.

Lex scripta. II. Of the Lex scripta — i.e. Statute Law: 1 Bl. 88. & bo. 20

Some parts of the common law derived, perhaps, from old Statutes not now extant. — 1 Bl. 85.

The oldest Eng.[h] Stat. now extant is the famous Magna Charta as confirmed in Parl.[t] 9 Hen. III. This is somewhat different from that of King John. (1 Bl. 85. 2 Hum. H. Eng. 145

Municipal Law.

What Eng. Stat. rendered here. (Wms. ch. 2. 3)

Ancient Eng. Stat. those only said to be binding here, as far as the common law of Eng.; i.e. prima facie. (ante, p.)
The reason assigned, in the Eng. books, why any of the Eng. Stat. are obligatory upon us is, that our ancestors on their emigration hither, brought with them so much of the law of the parent country as was then extant, as a birthright. *

1 Bl. 106. 108. 1 Tuck. Bla. 380-4. 391-3. Salk. 411. 666. Pow. D. 52. 2 P. W. 75. Kirb. 369.

* Much of the law here is of ancient Eng. Stat. — Ex. ~~Stat.~~ Law of entails (St. de Donis) — Trsp. on ca. (St. Glocester. 2) — St. de conis — Supersedeas &c.

Eng. Stat. passed since our emigration are not on principle, here ~~binding~~ obligatory upon us.—

In some of the States, the body of the Eng. stat. law ~~down~~ down to a certain period, has been adopted in a legislative act. — We have no such act in Ga.

It seems to be generally consider. that no Eng. stat. since the reign of 4. 8. is now prima facie law here. The stat. since that reign being deemed motion, within the above rule.

Of the Several Kinds of Statutes.

Stat. division of Pub. & Private.

1 All Statutes are either public or private; ~~1 Bl. 85~~ — or, general or special. 1 Bla. 85

Public, one which regards the whole community; — Private, which regards particular persons, & private concerns; & is a sort of exception to the general law 1. Bl. 85. 86

Lex scripta.

Stat. public & priv.

Application of this distinction not always obvious.

Most public Stats do, indeed, literally & immediately regard the whole community. Ex. Stat. of frauds, usury, limit. &c. So a Stat. enacting that no person shall do thus & thus — or that whoever shall do thus, shall be guilty &c.

But in many cases, Stats relating immediately & in terms, to a ~~particular class of men only~~ part of the community, are public. — Rules — If the class of persons, to whom a Stat immediately & in its terms relates amounts to a genus, it is public; if to a species only, it is private. — So if the Stat regards an individual only — Ex. — Stat relating to all mechanics is public; — to all taylors &c private. — respecting all ~~officers~~, qualified to serve legal process, public; — respecting all constables*, private. So, Stat respecting J. S. is clearly private. 1 Bl. 86. 4 Co. 76. a. b. 19 Vin. abr. 496 - 8. 2 Saund 154. 1 Lev. 86. L'Kay. 120. 381. 4 Bac. Abr. 639 &c ~~Exp. p. 1~~ "all sheriffs & other officers", — public — ~~&~~ "all sheriffs" — "Sheriff of the County of A", — private.

* Qu. If y. Stat. relates to their public official duty? & only when it regards their private, personal concerns?

Municipal Law.

Liability Subd. of Sections

In Eng. every Stat. which concerns the king is public — Head of the body politic. (1 Bac. 640. 4 Co 77. 8 Co 28. 138. Hob 227. Sid 209.

Hence, a Stat. giving a forfeiture to the king, (or here to the State) is public, tho it concern only a species of persons. (4 Bac. 640. Skin 429.

So a Stat. which concerns the public revenue is public. (4 Bac 640. 12. Mod. 249. 613. 10 Co 57. Plowd. 65.) Ex. a Stat. laying a tax on all carpenters.

A Stat. may be partly public, & partly private. 4 Bac 640.

Declaratory & Remedial.

II. Another Division. — All Stats are either declaratory of the common law, or remedial of some defects in it — (1 Bl. 86.) — Declaratory declare what the common law is & always has been. — Remedial of defects &c. introduce a new law, by supplying the deficiencies, or abridging the ~~superfluities~~ superfluities of the common law. (1 Bl. 86.) — Ex. of declaratory: Our Stat defining the tenure of lands in fee simple. (St. Con 253.) — of remedial &c. Stat. of limitations, frauds &c.

How are new Stats declaratory, or in primarily of law. Mag. Ch. &c. 34. H. 8. c. 5. 14. 1 Bow. Law. 141-2. 4. Bac. 550. Co. 2. 335. Cal. 354. - 304. 22.

Lex scripta

Stat.: penal & beneficial.

III Stat.s inflicting a penalty or punishment of any kind, are penal Stats. (4 Bac. 450-1 Bro. S. 414. 415.

"Penalty," in its extensive sense, is synonymous with punishment. (Bro. S. 415.) ~~In~~ In strictness, all Stats. properly giving higher remedies than the rules of natural justice require, would seem to be of penal. (~~[illegible]~~) For however, they operate penally. Ex. Double damages. They are not so considered.+ Salk 212. Bro S. 414 Ba. 1 Wils 125. ~~[illegible]~~.

Com. "action on Stat." A. 1.

+ For y.e dam.s, the double, are given as dam.s i.e. as compensation, & not as a punishment.

Stat.s not inflicting a penalty or punishment of any kind, are ~~not penal~~ usually called remedial, (4 Bac 650-1. 1 Wils 126- 7 T.R. 259; or "beneficial" 3 Co. 7. b. + ~~Stat.~~

"Remedial," here used, as contradistinguished not from declaratory; ~~not penal~~ but from "penal" - ~~called "beneficial"~~.

~~Sweet. v. t.~~

Stat.s giving costs are holden to be penal. (Salk. 205. Carth. 119. 122 4 Mod. 7. Comb. 100.) For Costs are not known at common law, & are regarded as a kind of penalty. (1 Bac 511. 4 Bac. 651. Rad 357 2 Inst. 285 Salk 205); & substitute for y.e ancient amercem.t first allowed by Stat. of Gloucester, 6 Edw. I. (1 Bac 511. Bullock. Law of costs.

+ ... is ... y.e ... disused, ... ~~[illegible]~~ as part of y.e ... ~~[illegible]~~ in civil ...

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Suit, 43.

But, on action brought, by an individual in his own rights to recover ye penalty of a stat. is a civil action; tho the law is penal. (Cowp. 382. 391. 1 Wils. 125. 4 T.R. 753. 7 T.R. 257. 1 Kent.) It is a suit between A. & B. not a public or criminal prosecution. Ex. Debt on the Eng. Stat against bribery.

IV. All Stats are affirmative or negative - distinguished by their Phraseology; i.e. from their being penned in affirmative or negative terms. (4 Bac. 641. 2 Inst. 200. 1 Bl. 89.) This distinction seems to be of no practical conseqce - tho' it is made ye ground of a supposed diversity, in a rule of construction.

From what time Statutes have effect.

From what time taking effect.

In Eng. every Stat. commences its operation on the first day of that session of Parl. in which it is enacted, unless some other time is fixed. (4 Bac. 636. Cowp. 91. 4 T.R. 500. ~~Plowd.~~ Hob. 111. 309. 222. 553. Ld Ray. 371. 19 Vin. 495. 1 Sid. 310. 1 Br. P.C.)

Retroactive in many cases. - The rule is now altered, by st. 33 Geo. 3. c. 13 - that Stat. takes effect from ye time of ye royal assent given.

In this country, as I conceive, it now takes effect from ye time of its date (7 Wheat. 154. 1 Kent, 420. 1 Gallison, 62.

Lex Scripta.

Of two Stats enacted in the same session & on the same subject (no time being fixed, neither has priority (1 Jon. 22. 4 Bac. 636) ~~3 Bac.~~ 3 Bac. 6 Mod. 287, 4 Bac. 535 that if repugnant, the latter only shall have effect. 19 Vin. 520 - The latter seems the better opinion.

In Conn. till of late, no definite rule was established. But hold, that all must have the means of knowing the law, before their rights are affected by it. - The Session must, at least, have closed, before it can take effect. - ~~Nor perhaps, it will take effect from its date. (See last p.)~~

Now In Conn, by Statute, passed at the session in 1821. Vol 1. p. 258 p. 5 - it is Enacted, that all public Statutes shall take effect from the sitting of the General Assembly, by which they are passed, unless therein directed to take Statute.

Of the Construction of Statutes.

Construction what. (1 Pow. 6. 370.)

The rules to be observed in the construction of Stats are intended to aid ~~the mind~~ in discovering what the law is; i.e. ~~how~~ what is the will or intention of the Legislature.

SS. In the construction of Stats (especially remedial ones); three points are to be considered: The old law, the mischief, & the remedy: - i.e what the law was, at the making of the act; what the mischief, or evil, for which the old law did not provide; & what remedy the Stat. has provided. - Construction, such, as to suppress the mischief & advance the remedy. 1 Bl. 87. 3 Co. 7. b.

The two first principally important: For the object of the rule seems to be, to discover, from these two, what the (the) rem-

Municipal Law.

Continuation of post 22.

edly) is Ex. Leases by Bishops for more than 21 years, declared void - adjudged good, during the Bishop's continuance in his see - & mere voidable, on his death, or resignation.

The rules before laid down (pages 2 & 3.) with respect to the interpretation of law in general, to be observed under this division. viz. That words are to be understood generally according to their most known, usual & popular signification - Terms of art according to their acceptation among the learned in the art. - Being dubious: context & preamble to be consulted - ~~to~~ Other stat. relating to the same subject to be considered - Words to be understood with reference to the subject matter - Effects & consequences of different constructions, to be regarded. - Reason & spirit (especially if the stat. is remedial) to be considered.

Lex Scripta

Construction of

Penal Stat. if it is said, construed strictly – or according to the letter. (1 Bl. 88. 4 Bac 651. 3 Co. 7.8. Leach 107. 8 Mod 65. Plowd. 17) Ex. stealing "horses" ousted of clergy by Stat. 1 E. 6 – Stealing a horse, with, not – 2 Leach C. L. 170. 295.) ~~within it~~ – But the rule, according to the true meaning of it, is: that penal Stat. are to be construed strictly against the subject, & equitably for him. i.e. 1st a person shall not be adjudged to be within a penal Stat, unless he is within the letter of it, tho' clearly within the spirit or reason. – Here the construction is strict – ~~in his favour~~.

2d On the other hand tho within the letter, he shall not be adjudged within the Stat, unless he is also within the spirit or reason of it. (Leach 233. 310.

The spirit of a penal Stat. then may be consulted to take one out of it, not to bring him within it. – Resolv. He must be within both letter & spirit to be punishable under it. (Leach 387. 1 Hawk. Table. Tit. penal Stat. – p. 53. 61. 116. 131. 138-9 4 Bl. 193. 4 Bac 651. Plowd 17.) – Ex. Stat. that "whoever does a certain act shall be guilty of felony." – madmen not within it. (4 Bac 649. Plow 465.)

+ Cont. Ca of stealing horses supra – within the spirit, not the letter.

+ This rule is drawn from the benignity of the law towards persons accused of crimes.

Municipal Law.

Construction of Stat. exempt. from civil punishm. by Stat. Burgess.

And in general, any universality of expression, in penal Stats. includes not those (unless named), ~~those~~ who, by reason of legal incapacity, are, ~~exempted from laws similar in operation &c.~~ ~~Infants~~ ~~infancy~~ ~~exempt~~ ~~Infancy no exp. of corporal punishment &c.~~ ~~Hob. 147 243~~ 19 Lin. 501. (~~Hob. 90 pt.~~) - 1 Saund. c. 54 p. 35 - [Parent & Child, Ex. Stat. - infts under 7 years old - no mean rea - no mean rea other infts - see Parent & Child

The intention of the legislature is not, however, to be disregarded, ~~it is said~~ in construing penal Stats. against the subject. ~~it is said~~ (1 Bac. 651. 3 Co. 7. 8 8 Mod 65. Plow 86. 4 T.R. 3) That intention, if apparent, ought to be the criterion in construing all Stats. (4 T.R. 2.) Being the law is evaded, if the express will of the legislator is the law.)

If the repetition of an offence incur an increased punishment, the offender is not subject to it, unless judgment has been given against him for a former offence of the same kind. — And he must have been convicted of the first, before the second was committed; 1 Bac. 651. 1 Hawk 168. 1 Hale 324. 570. 685. Dy. 323 2 Bulst 349. Rol. 52. 103.) Q. Is he not liable to the additional punishment? This case examines a strong instance of the tension construction of penal Stats. It is founded on construction.

+ Otherwise, there is no legal proof of the first offence in the first, for the second — this case is founded on a gen. prin. in evidence of evidence.

[Introduce section, marked # p. 21.]

Mun Law

Rights — Wrongs.

Persons — Things — Public — Private

Natural — artificial.

absolute — Relative

Pri Lec — Pu Lib. — Pri prop.

Cf. Lyn 204

Wm L. Learned

Lex Scripta

Construction of. 3. The rule of strict construction (against the subject) has not been uniformly observed. Ex. By Stat 25. E. 3 a servant, who kills his master, is guilty of petit treason. — killing master's wife, holden within it. (4 Bac 651. Howd 86.) Two Stat of H. VII. & H. VIII. made the departure of a soldier from his captain without licence felony. — Departure from a conductor, holden to be within them. 4 Bac. 651. Cro. C. 71.

Vatt. b. 1. ch. 19. 232-3.

Penal laws of one country cannot be ~~noticed~~ taken notice of in another, so as to affect the rights of individuals (citizens) in the latter. (Kely 79. 80) — Strictly local. — But the penal laws of each country extend to aliens, while in the ~~realm~~ country. (1 H. Bl. 123. 3 T. R. 733. Kellogg & Ux. vs. Baldwin. S. Ct. Augt 1801. Kel. 38. Vat. lib. 1. c. 19. § 232.

See Lansing.

It has been decided in Con^t however, that if goods are stolen in a neig. Kingdom, state, & brought by the thief into this; he may be prosecuted & punished here. — (Mass. R. 3 Comp. R. 185 on the ground of precedent merely)

2 Mass R. 14 115 sec. — Can this be law? (2 Johns. R. 477. 479. Cont — State v. Pugh. Supr^t C. U. S. Cont^t

See p. 20. ~~Voluntary in Con. that~~

When a penalty is repeatedly incurred by the continuance of an offence (as in the case of nuisance, held in Con^t, that one only can be sued for at a time (Rook 52. 2 Swift 289.) ~~That bar it cont~~ — (Ex Kes. R. 5 Cont^a

Cont.

In administr^g of remedial law (i.e. in civil suits) municipal courts administer the laws of their own states; but in some cases ye Lex Loci contractus is ye law of ye

Cont.

Municipal Law.

Construction of.

Remedial statutes, construed liberally, or equitably; the letter enlarged or restricted, to effectuate the intent. — i.e. cases not within the letter, adjudged within the Stat. & e converso. (3 Bl. 430-1. 4 Bac. 649. 650 3 Inst 381. b. 3 Co. 7. 1 Co. 123. 11 Co. 71. Plow. 365. 465 Pow. D. 140. 141.) Ex. Stat 9. Ed. III. c. 3. giving a remedy against executors, holden to extend to administrators. (4 Bac 649. Plow. 467. ~~Post no. for~~) — "All persons" in the Stat. of devises 32. Hen. VIII. includes not femes covert, infants, idiots &c. Pow D. 141. Dy. 354. b. & 1 Ves. 300.

Under y.e rule ~~not only sentences, & clauses but single~~ words, & even technical terms are, sometimes, construed in a sense, diff.t from y.e wh they usually extends.+

+ Thus:- an action, section, declaration, void, in Stat. is yet holden to be voidable — Unless of the mischief would be better by construing it void: it must be a void void: Otherwise it may be a void void only voidable. 11 Bla. 87. 3 Co. 50. b. 60. Co. 61. 141. 2 Co. 10 Co. 57. a. Co. 45. 2 Ro. R. 336. 7 Ill. 310. 2 Ro. R. 413. (Leite, 17-18.) Ex. 1. Stat. ap.t fund.t crown. 2. Stat. to release by bishops. ante, 18.

When a Stat. enables a Ct. to do a matter of justice to a party, the Ct. is bound to do it, in cases, falling within the Stat. tho such Ca.e enabling words, as "may, &c." are construed, as imperative. Ex. gr. Stat. 4 & 5 W. & M. enabling B.R. in certain Ca.s to award costs, to defts. on informations. 4 Bac. 544 2 Hawk 253. 3 & 4. S. Stra. 1131. 5 T.R. 538.) — But y.e rule does not obtain, yet they extend to execution off.s is rel.d to their Bus. ness. (Ca. of Eye. &c. Kean

A Stat. taking away a common law remedy, is construed strictly. (4 Bac. 650. 10 Mod. 282. + Because it abridges the rights of the subject. I suppose. — ~~Ex. Stat of Limitations~~ Sed vide (1 Sal. 421. Rumney & 58. 4 T.R. 308. de stat. of limit.s — ~~Vide~~ But y.e obj.t of ~~the~~ y.e Stat. is, not so much, to take a way a right, as to quiet ~~a~~ poss.n Hence, called a Stat. of repose.

ante, 14.

Words of an explanatory Stat. (i.e. one explaining a former Stat.) not extended by construction — taken in their strict sense. (4 Bac. 650. Carth. 396. Salk. 534.) — Otherwise there would be no end to construction

Lex scripta

Construction of.

Stat. partly penal, partly remedial — Construction strict as to the former liberal as to the latter. (4 Bac. 652. Plow. 36. 59 Pre. ch. 215.) Ex. Stat. against fraud construed strictly as against offender; liberally against the offence, i.e. to set aside the fraudulent transaction. (1 Bl. 88. 4 Bac. 651. Plow 57. 3 Co. 82.

Different parts of a stat. to be construed, if possible, that the whole may stand, ~~if possible~~. — But a saving totally repugnant to the body of the act is void. (1 Bl. 89. 1 Co. 47.
Ex. Stat. vests in the king the lands of A, saving the right of A.

(See Contracts. 4 Bac. 254. Wrongs 1 Bac. 8. Same in construing Contracts)

The rules of construction are the same in equity, as at law. The remedy or relief, the mode of proceeding in chancery is different. (3 Bac. 431. 438. 1 Fonb. c. 2. ~~[illegible]~~ 3 Ch. 1.)

Const. & stat. law are both equally the

Const. & stat. law equally valid.

(When common law & stat. differ, former gives place to the latter — So, if two stat. are repugnant the other is repealed. 4 Bac. 638. 641. 2 Com. 226. 4 Com. 381. 19 Vin. 511 Co. 6 Mod 287. Co. L. 111. 115.) ~~Latter repeals former.~~ 1 Bl. 89. — So, if latter part of stat. is repugnant to former part; former part is repealed as far as repugnant.
11 Co. 63. 4 Bac. 638.) — These rules are considered on the same principle, that the last expression of the will of the Legislature must govern

Municipal Law.

Repealable. + or, only by a majority of 2/3 rds. — Note such a provision in the Constitution of the State. It is very clearly void.

As every Stat. in its nature repealable — a clause in a Stat. that it shall not be repealed + is void. (4 Bac. 638. 4 Inst. 43.)

Such clause is in derogation of the power of subsequent legislating; For the power of making law necessarily involves the power of modifying, changing & repealing. it is hence a general rule, that all acts in derogation &c (ut supra) are void. (1 Bl. 90. 4 Bac 638. 4 Inst. 43.)

Repeal by implication.

But the law does not favor a repeal by implication — repugnancy should be clear, to have the effect. 4 Bac. 638-9. 11 Co. 63. 10 Mod. 118. 1 Rol. R. 88.) ~~to have the effect~~.

Said that affirmative Stat. do not abrogate the common law. (4 Bac. 641. Co. L. 111. 115. 2 Inst. 200.

They do, if they imply a negative of the common law (1 Bl. 89. Com. "action upon Stat." C.) Ex. Suppose 6 days notice to a deft good at common law. & a Stat. requiring 12. (Leach. 252. 1 Show. 206.) — The only qnes, whether it is, or is not, consistent w. the com. law.

+ If a Stat. inflicts a higher or lower punishment for a given offence, than is inflicted, by an older Stat.; the older is repealed. (Leach. 252. 1 Bur 2026. 4 Bac 654. 12.) Not to be presumed, that the legislature c. intended to provide two distinct & independent remedies by Stat. of their own. "implicitly"

So if a penal Stat. inflicts a lower punishment than the com. law.

Ex. com. — 3 years imp. — punishment of Stat. a fine. 10 Mod. 337. 4 Bac. 654. 12. 1 Bur. 2025. 2 Show 30. — Or, if they do not. There are 2 concurrent remedies — that remedy called cumulative 2 Bac. 803. 805. {If the Stat. inflicts a higher punishment than the pun. fixed by the com. law — the Stat. punishment is cumulative? Ex. Co. de Burn. — 5 Co. 4 Co. 138.

Com. L. Action on Stat. &c.

Municipal Law — Lex scripta. — are construed. The last rule arises out of the ~~longevity~~ which ~~=~~ penal laws.

When repealed by implication.

So an affirmative stat. (it is said does not repeal affirmative stat. — (This rule, said to hold, only where there was an antecedent com. law remedy: "An affirmative stat concerning any thing that was not at com. law, implies a negative of all other things") 2 Show 30.

This Rule 2 Lords arbitrary & unmeaning. — affirmative stat does repeal an affirmative stat if it implies a negative of the old one. i.e if repugnant to it — (1 Bl. 89.) Its being repugnant or not, decides the question. — This discovers the intention: and the intention of Legislature is ultimately the criterion, in all cases. (4 T.R. 3. 4 Bac 647-8 Plow. 232. 11 Co. 73.

The above distinctions, found in the books, between repealing operation of affirmative & negative stat, are not intended to apply to stat, containing express clauses of repeal; but only to cas. of constructive repeal.

Repealing stat. repealed — first revived. (1 Bl. 90. 4 Inst 325. 4 Bac (638.)

Municipal Law.

When repealing Stat. is ineffective.

Stat. repealed by 3 different Stat., 2 of which are repealed — the first continues repealed by the remaining one. (4 Bac. 638. 4 Inst. 43.

If a Stat. which has been repealed is revived; the repealing Stat. becomes void. (2 Inst. 686. 4 Bac. 638.) — i.e. so far, as it is in operation at the time.

Stat. repealed — acts done under it, before the repeal, good. — Secus, if a Stat. is declared null. — (2 Ins. So declared by the Legislature? (4 Bac. 633. Sent. 233) Such a rule is arbitrary & tyrannical. Ex gr. Georgia Stat. de Yazoo Lands.

When one Stat. is expressly repealed by another which makes different provisions on the same subject, to continue for a limited time, the former does not revive, on the expiration of the latter, unless the intention of the Legislature to that effect, be expressed. (3 East 205.) — The expr. clause on repeal shews, yt. the repeal was not intended to be limited to the run of yt. other provisions.

Retrospective.

General Rule. that Stats cannot, or rather, ought not to, have a retroactive operation (2 Inst. 292. Bract. lib. 2. fol. 226. 4 Bac. 636. 2 Mod. 310. 1 Bl. 46.): ~~(1 Ellis 47. 7 Ellis 4 707. 7 Ellis 4 707.)~~

For gr. rule, wch. forms a law, is to be "presumed." This, however, is but a theoretical prin. of elementary law, often disregarded in yt. of our legislature. Retroactive Stats are frequently just. — Gorham v. Thompson, 4 Com. R. 209 & 6 St. 190. Beach v. Walker. 4 Abb. 54.

+ as regards remedial Stats.

Retroactive laws prohibited by y: N. Hampshire Bill of Rights (4 Wheat. 577.

Lex scripta

But as to penal statutes y: rule ought to be rigidly observed.

Hence, if a penal Stat. after being violated, & before judgment against the offender, is repealed, & a new one made; he is not punishable under either. (1 Bl. R. 451. 1 Hawk. 169. 4 Bac. 636. 1 Ld. Ray. 59.) ~~unless there is a proviso in the latter.~~ U. S. vs. Treadwell, April 1808, arg.: — unless the former is contained in the latter, or the offence committed before it was repealed.

But a ~~law~~ stat. not essentially retroactive, may become consequentially, or indirectly: thus, if a ~~law~~ covenant be made to do an act lawful at the time, — made unlawful by subsequent stat; — the covenant annulled. (Salk. 198. 1 Pow. C. 446-6. Dy. 27. pl. 278. 1 Rol. 451. L Ray. 317. 321. 1352. 8 Mod. 51. 374. 5 Br. P. C. 269. 2 P. W. 218. 1 Fonbl. 211. All. 27. 8 T. R. 267.)

Ex. Covenant to export goods to a foreign state; — but then war declared against that ~~foreign~~ state — or exportation prohibited. "Contracts, 50.55. 141.) — Here, y: ~~stat. of Exp.~~ stat. is not retroactive: + It does not affect ~~directly any~~ a transaction ~~or~~ prior act, but merely prohibits a future one — y: conseq: of w: is, indeed, y: a prior cont: cannot be enforced.

+ In its terms & immediate obj: it is wholly prospective.

So if one covenants not to do an act, which is afterwards made his duty by stat. — covenant annulled (Salk. 198.)

Ex. Covenant that an apprentice shall not leave his master's service. — By a subsequent stat. he is compelled to enter an army. — Here the annulling or suspension of the covenant is not the object of the law, but the mere incidental consequence of a rule which y: legislature has a right to make.

Municipal Law.

• But if one covenant not to do an unlawful act, and afterwards the Stat. makes it lawful the covt. not annulled. (Salk. 198. – Reason y. covt. is not forbidden by y. Stat. – no inconsistency between y.m

If a contract, declared illegal by Stat., is made while the Stat. is in force, a subsequent repeal of the Stat. does not make the contract good. (1 H. Bl. 65.) – Ex. Late Stamp act.

+ Laws ab initio void. Not yet obj. to w. subsequ. Stat. to validate y. prior contr. made

prior contr. Indeed, it is, in its nature, incapable of being made good.

If complete performance of an agreement is made illegal by subsequent Stat., still if it can be partly executed, consistently with the Stat.; it may be enforced in part, in equity, (semb.) at law; Ex. Agreement by Dean & chapter to lease for 90 years – decreed for 40. (Plow. 284. 2 H. Bl. 56. 163. 1 Ambl. 209. 211. 3 Br. P. C. 389. 2 J. R. 254. 2 Pow. C. 31. 1 Pow. 448. 450. ~~Eq. pres.~~ – (See Contracts, 52.) This is applying the doctrine of cy. only, 52 ess.

+ if act of law can abrogate its remedy to y. exigency of y. ca. Ex. Covt. to ~~carry~~ perform 2 distinct acts – one of w. is forbidden, by subsq. Stat: Damages may be recovd. & trust for non-perform. of y. other.

• So if a literal performance is prevented by act of God. 1 Pow. C. 448. &c. Plow. 284. 1 Eq. Ca. Ab. 18 (No 24. p. 1) Contracts 52. 142.) – Ex. Agt. to convey house & land – House destroyed by lightning: Convey. of y. land decreed if required.

Constitution of U. S. prohibits the several states to pass ex post facto laws – & laws impairing the obligation of Contracts. Art I. Sec. 10.

State insolvent laws void as to prior debts when they go to discharge y. debtor before maturity

+ Ex. Ex. Ex. 1 Bos. & Pul. Cases, 2. 5 T. R. 4 Cranch, 122. 2 Pet. 8 Pet. 131. 6 Cranch, 87

Lex scripta

Qu. Does it affect the cases of covenant, supra? I think not. Prohibiting a future act, tho' it may consequentially affect a prior contract, seems not within the article.

Ex post facto law is a retroactive penal law. Bull vs. Calder Supreme Ct. U. S. - ~~ante~~ 3. Dallas 386. 391. - (see ante 2) 1 Bla. 46.

Impossible — Stat. requiring what is impossible are of no validity. 1 Bl. 91

Contry. to reason &c. — Said that Stat. contrary to reason or the law of God, are void. 8. Co. 115. Hob. 87. 89.
Qu. when the Legislature clearly intended to make an unreasonable or wicked law? As to collateral consequences, unreasonable, & probably unforeseen, the rule is, ~~just~~ (1 Bl. 91. 41. 1 Fonbl. 23.) that Cts. ought, if possible, so to construe the act, as not to avoid such consequences ~~this unreasonable~~. But to extend the rule further, wd be to exalt courts of justice, above the legislature.

Unconstitutional — Whether Stat. opposed to a written Constitution, are valid, is a different question. They are not. Usage of U. S. Cts. (Federalist No. 78. Vol. 2. Page 293. &c): and it is the province of Cts. of justice, in the last resort, to decide the question. (U. S. v. Hall, cor. Washington, J. Dist. of Conn. - about 1803) ~~Bay 171~~ 2 Dall. 304. 6 Wheat. 264. 5 Pet. 317. 158. 4 Pet. 316. 1 Cranch 137. 173. 3 Dall. 171. 1 Kent Com. 293. 384. 17 Johns. 195

Municipal Law.

General Rule. (When a Stat. enables a Ct to do a matter of justice to a party, Ct bound to do it in cases falling within the Stat. – "May" construed as "shall" in such cases. – & indeed in most cases. Ex. Stat. 4 & 5 Wm & Mary authorizing B. R. to award costs to defts in certain cases on information. 4 Bac. 644. 2 Haw. 203. 374. 5 Term. 131. 5 TR. 538.

If a Stat. makes a new law, concerning an old offence, & appoints certain particular judges to execute it; jurisdiction of B. R.+ is not excluded. – So if it provides that all crimes of a certain denomination shall be tried by certain judges. (1 Haw. 8. 9. 114. 9 Co. 118. Salk. 564. 1 Mod. 452 Bur. 1042.) – The ancient juris.n of CC of gen.l juris.n is not to be ousted by implication.

(ancient juris.n of B. R. when ousted & when not

+ (or of a C. of gen.l crim.l juris.n, jurisdiction, law).

If it creates a new offence & directs that it be tried by an inferior com. law Ct; the cause may be removed into B. R. by certiorari &c. (Cowp. 524.): The ancient power kept by B. R. of superintending & controlling such inferior courts, being not expressly taken away by such enactment.

If it creates a new offence & establishes a new jurisdiction for the trial of it, Quare. (1 Haw. 9. 1 Sid. 196. 2 Hal. 5 Cro. J. 643.)

Lex scripta

~~Ad. 123. 11 Stod. 1 Ill. Barnard. 209 — Cutt.~~

= It seems, that the jurisdiction of B.R. is wholly excluded in this case. (Cowp. 524. 2 Burr. 302. n. — ~~Burr. 800.~~) For y. C.t. keep no Seal incident to it. — & no ancient control on y. Tribunal, they established.

Authorities, confirmed by stat. — now executed.

If by stat a special authority is given to certain persons affecting the property of individuals: it must be strictly pursued: & it must appear so upon the face of the proceedings. (Cowp. 26.): Otherwise, y. proceedings are void, & those concerned in y.m, trespassers. Ex. Commis.rs of highways &c.

If a stat enables a body of men not incorporated to do certain acts, by vote of a majority, & constitutes a certain number a quorum; Qu. whether a majority of the quorum, unless it be also a majority of the whole, can act for the whole? — Semb. not. — Such bodies are the creatures of the stat. & have no other powers, than such as are expressly given, or necessarily incident, to them. Such power not necessary to their existence, or + (4 Bac. Ab. 642. 3 Mod. 13. 1 Rol. 513. 10 Co. 30. Hob. 211. 3 T.R. 594 4 T.R. 810: 822 ~~Bac. Ab.~~

vid. Joint Company, p. 10.

+ Gr. ex. of their powers.

Municipal Law.

An authority of a private nature, conferred by Stat upon two or more persons is joint & not several, unless otherwise expressed; & of course does not survive. (Root 67. (vid Devisee (b. 63.)) Ex. to sell infants land. Secus if the power is of a public nature. Semb. (Stra. 117. 1 Bac. 403. n. 442. Co. L. 181. (Sheriffs 1. 2. : It being then, in nature of an office. ~~But not constitutes, & true, only ministerial powers, not judicial.~~ Ex. The authority of ye Select Men of a town, in Con. — a majority can act, so as to bind ye town. (R. often.

+ It can be exercised, only, by ye joint act of all.

But If a power of a public nature is given to several, the act of the majority in the execution of it, (all being present) is the act of all. (1 Bos. 229. Co. L. 181. b. Bur. 1017. 1020 3 T.R. 592.

In case of corporations (all being summoned*), the majority of those present may bind the whole. (2 Atk. 212. 1 Bos. 236. 7 however small that no. may be.

* If it seems, it not be certain the summoned, unless, that not is necessary to a legal meeting? If ye meeting is regularly convened, is not ye suff.tio

"Voidly" in Stat. often construed "voidable"; — often taken in its strict sense. 1 Bl. 87. 3 Co. 59. b. 60. Cro. El. 207. 2 T.R. 606. 7. T.R. 310.

It has been said that "void" without more, might be construed voidable — secus, if the words "to all intents" &c. were added. — Not the criterion — "Void to all intents & purposes; has been construed voidable. 2 T.R. 606.

Lex scripta

~~Cro. Eb. 141. 3 Co. 59 b. 60 a. 10 Co. 59 a.~~

~~(Rule: If the object of the Stat would be defeated by adjudging the act voidable only; it must be adjudged void — Otherwise it may be adjudged voidable. 1 Bl. 87. 2 Nev. R. 413. Co. L. 45. 3 Co. 60.~~
~~Ex. 1. Bishops leases, ante 1 Eliz. — 2. Our Stat. against fraudulent conveyances, void as to creditors. Stat. 217. (355)~~

~~Several Stats relating to same subject, all to be considered in construing one. 4 Bac. 646. Plow. 206. 1 Ray. 1028 (ante ~~[illegible]~~ page 2.)~~

~~(Rules of construction the same in equity as at law. — remedy or relief (i.e. the mode of enforcing the law) is different. 3 Bl. 430 - 1. 438. 1 Fonb. 22. (vide Wals. L. P. 97-8 Doug. 264 as to construing contracts) No. 23. p. 1.~~

Municipal Law.

Of Pleading Statutes &c.

the mode of prosecuting upon them.

Pleading Stat.

+ The rules, w.h y.e books frequent on y.s subject are, in many instances, now ~~very~~ confused. They cannot in all ca.s be reconciled. Frequently, however, from a frequent contradiction arises, merely, from inaccuracy, or looseness of language.

+ Merely to plead a Stat, nothing more is necessary than to state the facts which bring the case within it — Ex. Stat of limitations; "upon a.s.t. infra sex annos." (3 Lev. Ray. 11. 221.) — St. of frauds; "St. Rowe, or memorandum" &c. — And he who sues, or prosecutes, upon any stat, must, of course, plead it — i.e. state y.e facts, w.ch y.e stat. & in manuscript, or printed, a.c. (Ex. Stat. Stamp. &c. Edw.d Stat.)

+ Editor, y.e ca. cannot appear to be written y.e Stat.

Counting upon a Stat consists in an express reference to it: as by the words "against the form &c of the Stat. in such case made" &c; or by other words, adapted to the case; as "by virtue of the Stat" &c.

+ in connexion w.t y.e statement of facts, w.h bring y.e ca. within them.

Reciting is distinct from both — (tho' it is ~~frequently~~ sometimes the case that Stat.s are pleaded by reciting them.) — Reciting a Stat, is quoting its contents.

+ for must they be proved. #

+ if it is denied they must be proved.

General rule: Of public Stat.s judges are bound to take notice, ex officio, i.e. without being set out (~~in pleading~~ + cannot do it, + reciting it) Of private, not bound to take notice, unless ~~specially pleaded & shewn~~. 1 Bl. 86. 4 Co. 76. Cro. E. 236. 19 Vin. 498. 1 Bac. 38.

For they are part of y.e gen.l law of y.e land, + presumed to be known to y.e judges

For priv.e St.s are no part of y.e gen.l law — ergo not publically known to Ch. of Justice.

Lex Scripta

Pleading Stats.

10. Co. 57. 2 Mod. 57. 2 Rol. 466. It is Necessary, ~~[illegible]~~ thus, at com law, to set out (i.e. to recite), a private Stat in order to take advantage of it, in pleading. ~~of public Stat. post~~.

* By virtue of the Stat. of Pleading.

* In Conn. ~~however~~ a private Stat as well as a public one, may be given in evidence by way of defence, under y. gen.l issue ~~i.e. by deft.~~ ~~without pleading it under general issue~~ (Stat. Con. 342.) ~~Private however~~ Stat. must, if, It. required, be read in evidence; public need not.

1 ~~(2 Swift. 215. that Stat of limitations must be pleaded to actions of assumpsit. Qu.~~

But in Conn. ~~however~~, as well as in Eng., if an action is to be brought on private Stat. it must be set out; i.e. recited, a ~~Like specially.~~ ~~Com. law rule prevails in this case.~~ If not set out, the cause of action does not appear in y.e dec.lar.n. 1 Bac. 38. 4 Bl. 655. 4 Co. 76. 10 Co. 57. 2 East, 341.
+ Stat. 2. 2

A public Stat, when required to be pleaded, need not be recited. Judges take notice of its provisions, ex officio (1 Bac. 38. 4 Bac. 655. 4 Co. 76. 10 Co. 57. 2 East, 341. Fost. 125. Hawk. c. 25. s. 100. Co. 2. 230. ~~[illegible]~~ + Stat. 2. 2 Sidem + (But Public Stat. must, in some instances, be counted upon. (Post.) ‡ Suff.t to state y. facts constituting y. ca within it. Ex. Usury [illegible] to debt on bond.

Municipal Law.

Pleading stat.

But misrecital of a public Stat is in some cases fatal, even after verdict. (4 Bac. 658. Cro. E. 245. 236. 19 Vin. 508. Doug. 90. Cowp. 474. Esp. 134-5. Ld Ray 382. Cro. E. 232. 2 Mod. 99.

Not so (it is said), if the misrecital is in an immaterial part. (Cro. E. 376. 136. 522. 4 Bac. 659. p. in ye case it is to be cured by verdict. - Str. 241.

But by Holt - ~~Generally~~, ye misrecital of a public Stat is not fatal unless the party pleading "tie himself up to the Stat" as recited; as by the words, "contra formam Statuti prædicti", or similar words (Ld Ray. 382.) If the conclusion be, "contra formam statuti", generally, Judges take judicial notice of the true Stat, & ye Misrecital does not injure ~~I suppose it surplusage~~ (2 M'N. 516. Ld Ray. 382. Plow. 79. 84. Cro. E. 232. Freem. 211. (For, if no recital is necessary, it may be in ye ca. This seems to be the true distinction, even tho' the misrecital is in a point immaterial. (Doug. 90-2. 2 M'N. 516.

+ Then holden fatal, even after verdict. Cro. E. 235. 245. Cro. C. 232.

The effect ~~instruction~~, then, depends upon ye mode of counting upon ye stat.

Lex Scripta?

Pleading Stat.s

+ For ye court cannot know judicially what ye true stat. is.

~~+ or, by recital on oyer, and ~~ demurring to ye tenor of a deed.~~

Misrecital of a private Stat.t not fatal after verdict or on demurr.t + In both cases, taken to be, as pleaded. The Stat. should be denied by "nul tiel record"; or the variance specially shewn by pleading; ~~[illegible]~~ 4 Bac. 658. 2 Mk. 517. + Stat. 2. 5. L.d Ray. 382. 2 Mod. 241. 1 Sid. 356. - ~~as in case of a deed.~~

~~(or after over the parts may demur)~~: ~~Or by reciting ye stat. on oyer, & demurring to ye pleading;~~ Or, by reciting it when shown in ev.ce, & demurring to ~~it~~ ye ev.ce)

In many cases when to be used, by way of defence, ~~[illegible]~~ a stat. stat. need not be specially pleaded (Cam.e 34). ‡ But

~~In Eng.~~ Even a public stat. when to be ~~used~~ ~~[illegible]~~ to defeat a specially, must be specially pleaded. Ex. Stat of Usury; — against gambling &c (5 Bac. 419. 5. Co. 59. b. 119. a. 3. Salk. 391. pl. 7. Hob. 72. - (~~no 2. 4.~~) ~~by way of defence~~,

~~[as so in Bogg. Stat. the may be used in ~~[illegible]~~ the gen.l issue. pl. 6. 352) - (for Pleading.]~~ But it may be used in ~~[illegible]~~

So, whenever ye defence pronounced by ye stat. is not consistent wt. ye gen.l issue in ye action, ye stat. of limit.s in assumpt.; has p. ex. 1 Saund.e 283. Cro. B. 196. 2 Ro. R. 158. Esp. 142.

In declaring on private Stats. it is necessary to recite them: ~~[illegible]~~ Because not known judicially, to ye court. (4 Co. 76. 2 Rol. 466. 2 Mod. 57.) - Suffic.t, honor to recite ye substance of them: the recital need not be literal; suffic.t to recite ye m.r as the calties are recited.

So, in pleading them, by way of defence.

‡ Ex. Stat. of frauds; stat. of gaming, in assumpt.; &c.

+ This is req.d not to inform ye Ct. what ye stat. is; but to conform ye plea to ye ds. Lnec.

Pleading, 65.

+ not only to state ye facts, wh. bring ye ca. within them — but also,

Municipal Law.

Recital of Stat.s

Part public & part private - no need of reciting the public part. 10 Co. 57. Hob. 227.

Never necessary to recite the title of any Stat., nor the preamble, - or the enac not reciting of the Stat. of 1 Com. 230. 3. Co. 33. 4 Bac. 655. 658. 2. 3. 5

Ergo, once holden, that the misrecital of the title of a public act was not fatal, on demurrer, not merely Surplusage. (2 Ray. 77. Hardr. 324

Since decided contra. (4 Bac. 658. 6 Mod. 62 - 2 Ld. Ray. 1. For the pleader, it is said, "lies himself up to it as recited." - [Ld. 2 Ld. Ray. - except by ye words "statute predicty" ye fante, 35)

~~The effect of misrecitio ye title appears tho ye Stat. as ye ob. misrecitio ye contents of a Publ. Stat. (ante, 35.) - ye recital of mis-(for a thing necess.) the recital, tho' unnecess., becomes part of ye description of ye Stat.~~

~~In Eng.~~ The recital of a Stat. where recital is necessary, must contain its date, & place where enacted. - Secus, ill on general demurrer. (~~1 Com.~~ 231. 4 Bac. 657

2 Haw. 246. Cro. J. 211. 19 Vin. 507. Cro. C. 232. Comp. 474. Com. D. ~~Action~~ on Stat. S.) - This rule, however, is applicable, it seems, only to private stat.s. As public stat.s never require recital.

Lex Scripta.

Pleading Stat.

To declarations &c. on private Stat. nul tiel record may be pleaded. (4 Co. 76. 2 Mod. 57.

Secus of public Stat. (4 Bac. Abr. 655. 8 Co. 28. Cro. E. 355. (~~Not a question of fact~~) whether there is such a public Stat. is not a question of fact. – the judges know it judicially.

General rule: – In declaring upon a public Stat. it is not in general necessary to count upon the act. (19 Vin. 503. 1 Bac. Abr. 38. Earth 382. Cro. E. 601. 1 Com. 230.) Suff. to state ye facts, wt bring ye ca. within it. Ex. Action agt a town in Com. for dams sustained thro' defects of a high-way.

Exceptions:-1. (~~But~~ If there be a remedy at com. law & by Stat. it is said to be necessary – Secus, not known, ~~which~~ which remedy is pursued. (1 Com. Action on Stat. E. ~~[illegible]~~. Lutw. 584. 4 Bac. 18.) – Or rather, the com. law remedy would be presumed to be pursued. Said in Com. sup. ye ye Stat. must be rehearsed. Not law.

2. So, in actions on penal Stats, they must be counted upon, tho' public. – i.e. in all cases in which penalties are inflicted, & actions or prosecutions brought to

Municipal Law.

Penalty of Stat. recover or enforce them. (2 Hawk. (251. i.e. B. 2. C. 25.) 116.) 356-7. Plow 206. 1 Bac 38. 19 Vin 505. 7 J. R. 521. Rel. 32. 341-2 (n.) 2 East 333. 1 Vent. 103. 6 East 126. – Ob. of maintenc. & all crim. & cos. – 2ly. Is there any reason for this rule?

3. If a public Stat gives a new action, i.e. one unknown at com. law, & counting upon it necessary. * (~~The rule says it must be recited. But, Recital formerly thought necessary. See 6 East 334.~~) 4 Bac. 656. 19 Vin. 504. – see Jack. 505. Holt 634. 2 East 339. 341.

Ex. (Waste, to recover the place wasted. &c. / 2 Inst. 121.

(They being no formed action, adapted to the case at com. law. – vid. Salk. 505. Holt 634. 2 East 339. 341.

For, the action being unknown to the com. law, the Stat ought to show upon what it is founded: or rather, without this counting, he wd be supposed to declare, as at com. law; ~~when, at com. law it was not lawful~~ whereas, by the com. law, he cannot recover the place wasted. – See an. as to the reason of the rule.

(Where it extends an old action, or remedy to a new case the general rule holds, i.e. Counting upon the Stat is not nec. Ex. Stat 4 Ed. III. giving trespass to executors for goods of testator wrongfully carried away in his life time. (Sometimes called Stat. de bonis asportatis. – Sometimes de arboribus &c.) 4 Bac. 655. 19 Vin. 503-4

* As the rule is expressed in one of the books, it must be recited. But this is not true; the recital was formerly thought necessary. 2 East 334. – The rule contemplates a new giving of action – not a new right or remedy by Stat.

Lex. Scripta

Pleading Stat. 1 Com. 230. Dy. 83. b. 85. a. b. 2 Bac. 439. 445. 1 Com. Action on Stat. A.

Trespass being a com. law action, no new form of ~~pleas declaring~~ ~~ing~~ is necessary: The form of pleading not being altered by ye Stat.

Accordg to rules, above given, it appears, ye, In actions on public Stats, ~~[illegible]~~ not penal counting is not necessary; ~~[illegible]~~ as if a Stat creates a right, ~~[illegible]~~ or a duty of the other, & gives merely damages for the violation, or neglect — So when a stat. not penal, creates a right &c, but does not expressly give any remedy, but leaves the com. law to enforce its provisions. (Carth 382. Sal. 212.) For The com. law furnishes the action.

+ unless a new action is given by the act, or, unless there is a concurrent com. law remedy:

post, 45.

For ye right of action is given, by neither of ye stat. alone — but by both together.

As to penal Stats, it is also a rule, that If one Stat prohibits an act, & another inflicts the penalty: both are to be counted upon, tho' public. # (2 East 333. ~~[illegible]~~ (Ow. 135. Plow. 206. 19. Vin 505. 4 Bac. 656). An offence may be laid, in one indictment, as against com. ~~law~~ & ~~the~~ Stat. law: — But this is done by different counts. (Leach. 235) {+ So, if one stat. inflicts ye penalty, & another gives ye action to ye informer. (2 East, 333.) Omission not cured by verdt. &c.

+ What part of a ~~[illegible]~~ Statute, consisting of concurrent & separate acts, is not the com. law part, ye a stat. only, the words, contra fac — ~~[illegible]~~ statute, are to be referred to the last antecedent. Ex. Breaking close, & hunting (Sal. 212. Carth. 382.

Municipal Law.

Pleading Stat.

If a temporary penal stat. having expired, is continued by a subsequent one; ~~(I counting upon the law is necessary~~ it is sufficient to count upon the former only. (4 Bac. 656. 638. 2 Stra. 1066.) — That continuing the law. The latter may continue its ~~[illegible]~~ duration — or, remove ye limita., by wch it expired.

* ~~(as, if ye law be perp.)~~

The words, "contra formam statuti", may be rejected, as surplusage, in an indictment &c. if the offence is at com. law only. (5 T. R. 162. 2 Hawk. c. 25. Cum. c. 20. Cm. Dig. Indtm. on St. C. 3. 115. 116. 8. T. R. 362-3. ~~But [illegible])~~ Qu. on ~~special~~ demurrer?

cont. 44.

Exceptions negatived.

Exceptions in the enacting clause of a stat. must be negatived, or excluded, in a declaration or complaint upon it. — ~~and the~~ Omission is not cured by verdict*. — Those in a separate substantive clause need not.\# (1 Bur. 153. 5 T. R. 83. 1 T. R. 141. 4 Bac. 650. 656. pl. 14. 15. 1 Com. action on Stat. A. 2. Ld Ray 120. Plow. 410. Doug. 331. 1 Bur. 148. 6 T. R. 559. 1 East. 646. 2 Mc N. 544. 1 Lev. 26. Str. 497. 7. T. R. 27. 8 T. R. 542. ~~[illegible]~~ (Kerry).

\# Hence, ye provisio in ye same stat. limiting ye prosn to one sn, need not be negatived. For it does not enter into ye description of ye offence; whereas ye exception does. (Ray. 65. Eyr. 300.

* So, in prosn on ye game-laws, ye unqualified person, ye qualifica. must be negatived. (Ibid.

Note ye analogy to ye ca. of an exception in ye body of a contract, & ye contra.

Lex Scripta

Pleading Stat.

In the former case, the exception enters into the description of the right or offence: - In the latter it does not; - but is mere matter of defence. ~~[illegible]~~ Ray. 65. Esp. 300

Mode of proc. when Cumulative

note 24. 2nd ed.

When there are two subsisting remedies, one at com. law & one by Stat, as the may be ~~[illegible]~~; either may be pursued. (2 Haw. 302. n. Leach. 235. 2 Bur. 799. 803. 805. Comp. 648. Sal. 45.

The Stat. remedy is cumulative.

And if ptff, in this case, pursues the Stat remedy & cannot support his case under the Stat; he may, in the same suit resort to the com. law remedy & recover, if the case can be made out ~~is sustainable~~ at com. law. (Mo. 750. 2 Bl. R. 900. - ~~Stevens v. Lawrence, 1 Ld~~ - Contra, for mere statute, "rejected, as such language" Cant. 42 (~~State v. Lawrence, for blasphemy, S. C. & C. by~~ Ex. ~~On the ground~~ Stapes, a Stat. agt. certain hospes, in night-season, ~~the~~ giving a certain name, in mock on ye Stat. ye hosp. is not, found to have been committed in ye neighbr.

+ It then is a great question at com. l. with-out it, the com. l. right of action.

Leading Rule of the Common Law, mode of prosecution. Ind. 42.

Municipal Law.

Same rule holds in public prosecutions. (1 Haw. 211. 2 Haw. 302. 356. 2 Keb. 138. Sal. 212. 2 Hal. 191. (State v. Mc Lawrence, 2 G. & H. 209. 1809.) Tho it was formerly holden contra. (Cro. E. 231. 307. 697. 5. Co. 99. 2 Hal. 71. 170-1 (~~Page 44 ante~~) (2 McN. 493-5. 5 J.R. 169. 5 Bac. 419. 1 Sid. 421.

[Introduce Section (7), p. 45.]

Mean not cumulative.

But if that which was no offence at com. law, is made ~~illegal~~ criminal by Stat., & a particular mode of prosecuting for it (~~or particular remedy~~) ~~pointed out~~ prescribed in the Stat.: that mode only, it is said, can be pursued:— All other modes are excluded. (4 Bac. 641. 654. Cro. J. 644. Sal. 45. 7 Co. 36. a. 4 Bur. 2323. 2 Bur. 803. 805. 834. 6 Mod. 86.

Ex. 1st The Stat provides prosecution by information, ~~still~~ indictment will not lie [— Ca. of usury 1 Mod. 174. 1 Burrow. 209. Ord. 123.— Sedgw. is to ye. Example; for usury was indictable at com. law (1 Sid. 421. 3 Bac. 391. Ord. 124 n.— & see Stra. 815.] Thus— a stat. in — a other stat. from wards; recity, y. if any person shall incur a private penalty he shall be liable to ~~£100~~, to be sued for, by an action.

But this rule is to be taken with qualifications. Indeed it holds only in two classes of cases; viz:

Lex Scripta

Mode of pros.n when not cumulative.

1st When the particular mode of prosecuting is prescribed in the prohibitory or enacting clause. —

2d When there is no prohibitory clause; as if the Stat. enacts, that "whoever shall do such an act, shall be punished thus + ~~&c. &c.~~ — In these two cases the particular mode prescribed must be pursued. (1 Bur. 544-5. 4 T.R. 205. 2 Haw. 302. n. 2 Bur. 803-5.

+ or inform.n

In these cases the offence & the remedy are so blended in the stat. that they cannot be separated in a prosecution. For ye mode ~~prescribed~~ of pros.n is prescribed in & forms a part of, the clause, on wh.h a pros.n must be founded. Ex. of Priv.e recognizance (ante) — The clause cannot be properly recited, or stated, without a recital, or statement of ye mode of prosecution.

Secus if the particular mode is prescribed in a separate substantive clause. Then any proper com. law prosecution ~~procedure~~ may be pursued. (4 T.R. 205. 2 Haw. 302.) For ye offence is created by itself in the enacting clause; & prescribing a particular mode of pros.n in a distinct subsq.t clause, cannot be implied against any broken com. l. form of pros.n when the enacting clause. Ex. Priv.e recognizance, ante — & ye mode of prosecuting, prescribed in a separate substantive clause.

Concurrent remedies. ante, 24. 43.

c. 44. ‡ ~~So~~ If that which is prohibited by stat. was before punishable by a com. law proceeding, the stat. remedy is cumulative; the com. law remedy & mode of proceeding may be pursued, tho the stat. prescribes another particular mode. ~~The latter may also be pursued.~~ ~~Stat. sanction is cumulative.~~ (2 Bur. 803 805. 834. 4 T.R. 202. 2 Haw. 302.) For,

‡ Here there was a remedy, independent of that provided by the stat; & the stat. does not oust it.

Municipal Law

Stats. giving no specific remedy.

ante, 41.
post, 50.

+ i.e. y. Com. Law supplies an action, or pros.

If a Stat creates a right or offence & ~~gives~~ prescribes no remedy or sanction; the com. law will lend its aid to enforce the one, & to punish the other, as a misdemeanor.+ (1 Bur 544. 2 Inst. 159. 3 Lev. 290. Doug. 425. 19 Vin. 512. 518. Cr. t. 635. 4 Bac 653. 2 Inst 55. 74. ~~10 Co. 75.~~ 6 Mod. 26. 1 Com. 229. 230.

Ex. "Whoever does such an act, shall be guilty of a misdemeanor" (not prescribing any part., punishmt, or mode of pros.)

ante, 41.
post 51.

If a civil remedy, ~~is to be~~ in such case, is sought, it is to be sought by action "on the Stat:" - that is, the right, to be enforced, is given by the Stat; but the remedy is furnished by the Com. law. - If an offence, thus created, is to be punished; the offender is prosecuted, as for a misdemeanor, in violating the wholesome regulations of the State. - (

So, to obstruct the execution of powers, granted by Stat, is an offence at com. law; & the indictment need not, & ought not, to conclude "contra formam statuti". (Doug 425.

Lex scripta

Who may prosecute

Who may prosecute on Penal Statutes.

General principle of com. law: Public offence not to be prosecuted by an individual in his own private right, or capacity. - The public is the party injured; ergo the remedy is the publics. (2 Hawk. 265. Jol. 4 Bl. 2. 5. 6. 7

- in Eng the kings. (4 Bl. 2.

In Eng. indeed, private persons do prosecute offenders, for the king, & in the kings name - even when no part of the penalty goes to them; & even by indictment. - They prosecute this for God's sake, it seems, in most cases. - Called prosecutors, or informers. (2 J.R. 47. 190. 198. 205. ~~Rudd 105~~. Leach 71. 242.

Any individual does it even in case of felony (Leach 242. 257. 233. 231. 229. 223. 198. 192. 260. 3 Bac 568

This Practice not allowed here - in some states, I do, I believe.

Municipal Law. – Qui tam

Qui tam prosecutions.

There is, however, a mixed species of prosecution, partly public & partly private, called qui tam; which is carried on by individuals here, as well as in Eng.d

+ State, country or other publ. body,

A qui tam prosecution is one, brought partly ~~in behalf~~ of the King+ & partly ~~at the suit~~ in behalf of the individual prosecuting. (2 Hawk. 264. fol. 4 Bla. 308. 1 Bac. 37.) – The individual prosecutor alone, sues in behalf as well of the King, or State, as in his own behalf. – The King, or State, is not strictly a party.

So called from the words of the compl.t "Qui tam pro Domino Rege" &c. (3 Bl. 162. Com. Lig. Action on the C. L.

These prosecutions are by action or information.

Qui tam actions are carried on by civil, qui tam informations, by a criminal, process. (3 Bl. 161. 2. 4 Bl. 308.

+ (i.e. w.t a criminal capias),

Qui tam complaints, accompanied with forthwith process+, are properly qui tam informations. These are criminal prosecutions.

But prosecutions g. ly commenced by civil, process, are g. ly actions.

Ind. 10.

1 ~~Ind~~ An action, brought by an individual in his own right, on a penal stat, is a civil suit. Cowp. 382. 4 T.R. 756-758 1 Wils. 125. 3 T.R. 448. 7 T.R. 257. Kirb. 179. 1 Root.

Lex Scripta. — Actions

Exec. Com. Bros.

Prosecution, suits, &c

Generally ~~brought~~ on penal Statt, to recover a penalty, or forfeiture, of some kind. (4 Bl. 308.

Indeed, as understood at present, they are treated & considered as creatures of penal Statt; (1 Bac. 37. Finch's L. 340.)

not known at com. law: Tho' actions, not, "Iam pro domino Rege quam seipso", were known, it seems, in certain cases, at com. law (2 Hawk. 377. 1 Rol. 1. pl. 1. 1 Rol. R. 78. 19. Cro. E. 877. Cr. J. 360. 361. 532-3

Popular action.

A popular action is one, given, by a penal stat, to any person, who will sue for the penalty, incurred by the violation of the stat. ~~some penal stat.~~ given to the people, because it concerns, (3. Bl. 160. 2 Bl. 437. Jac. L. Dictionary) ~~i.e.~~ to any one who will prosecute.

Sometimes the whole penalty is given to the prosecutor; sometimes, a part. (2 Hawk. 265. Fol. 3 Bl. 161.

In either case, the action is called popular, if it is given to any person, generally. (3 Bl. 161-2. 1 Mass. 165 pl 1 ~~Mass 179~~ Com. Dig. Action on Stat. E. 1.

Municipal Law.

Popular actions are, usually, ~~qui tam~~; but not always:
A popular action ~~thus~~, may not be qui tam: for the whole penalty may be given to the prosecutor: ~~then 220~~
~~[as in 2 Hunt 265 fol. where it is called qui tam & that 27]~~
And a qui tam may be not popular; for the right of suing "qui tam" may be confined to the party grieved by the offence. (Com. Dig. Action on Stat. E. 3. 3 Ed. 5.
~~vide 2 Hunt, ad fol. Bac. 27~~: as, where part of the penalty is allotted to him, only.

Popular action

* See 2 Hawk. 377. Bac. 37. whether it may be qui tam. (Bott, 52 mag.)

Civil action on Stat. infra, 45.

If an individual is civilly injured by an offence, prohibited by Stat. he may have his private remedy, by civil action on the Stat. — The Stat implicitly gives a remedy.
4 Bac. Abr. Stat. K. 653. 2 Inst. 55. 74. 10 Co. 75. b. (Com. D. "Action upon Stat." A. 1.)
~~Em. Stat. making breach of private trust, a misdemeanor.~~
~~No stat. expt. local, is issue~~

Bott. 52.

And whenever a Stat. prohibits or commands a thing, or ye protection of priot rights, an individual may have for the advantage of ~~an~~ individual, ~~no thing~~ an action on the Stat. for an injury, occasioned to him, by its violation, tho' the Stat. is penal, & no remedy expressly given to him. (4 Bac. 653. 1 Com. ~~220. 220~~ Action on Stat. D. 6 Mod. 26. 27. (2 Term. 377) ~~in the plaintiff~~, ~~Cargo Stat. 3 Ed. 1 stat. prohibiting prises to be taken, & upon the violation action. In this case penal stat. prohibiting seizure~~

† Ex. gr. Stat. 1. a Stat. ad. 5 Geo. 2 necessaries not actually given w. water, & cannot pass at sea.

Lex Scriptal

He may have qui tam action in these two cases. Terms. infra. ~~Ex. in place Stat. prohibiting private nuisances~~

Action on Stat. not give Com. Ante, 46.

When a Stat inflicts a penalty ~~to~~ against any one for dispossessing another of his right or interest (without appropriating it) he who is injured by the violation of the Stat (not the public or king) shall have the penalty, ~~to~~ & an action upon the Stat at # com. law (as it has expired) to recover it. 4 Bac. 653 Stat. k.

3 Lev. 290. Co. L. 159. Com. L. Action on S. Ct.

Ex. for not selling out tithes. The right of money is given to him, by ye stat: The form of action is supplied, by ye com. law.

Qui tam prosecutions, in what Cases.

Qui tam in what cases

1. If, for an offence, immediately injurious even to the public only, a Stat gives a penalty, ( ) or part of a penalty, to the individual, who shall prosecute for the offence; any person may have a qui tam action for ye penalty ~~to~~ # (Ex. A Stat against ~~smuggling~~ smuggling ~~the importation of wool~~ giving a bounty to him who shall prosecute.

ye. Stat. Ins. action or remedy supplied by the com. law, to enforce a right created by the Stat.

There can be no qui tam, or informer, of bringing the action per tam, if the word bounty be given to the prosecutor. Stat. post 53. & in 2 Chap. 18.

Municipal Law.

Qui tam in what cases, & Common.

2. So if by such a stat. a sum certain is given to the informer, & a fine to the king, or public. (1 Bac. 37. 2 Hawk. 265. fol. 377 or 379 Ordaun. ~~1 Com. 227.~~ 3 Com. 518. 4 Co. 13. Dy. 95. Com. Action on Stat. E. 1. F.) — For the stat. gives an interest to him who sues it. — (Last ex.)

But when a stat. forbids an act, immediately injurious to y.e publ. only — ~~But~~ unless a penalty is given to y.e prosecutor, ~~no man right~~ (ut supra.) no ~~individual can have an action upon it~~ (1 Bac. 37. n. 2 Com. 234. 2 Hawk. 265 fol. 377.) — nor an information in his own name: For he has no interest in the penalty, & no right of recovery of any kind, under y.e stat. — ex. Penalty for smuggling, not given, in whole or in part, to any private prosecutor, & no forfeiture given him.

+ ~~in the case in indebitatus in assumpsit to y.e public use.~~

3. ~~But~~ If a stat. prohibits an offence, immediately injurious to an individual, as well as to the public & expressly gives the individual injured either a penalty, ~~&~~ or damages; he may (& it is said ought to) bring a qui tam action;* ~~& in the penalty, & is given to him.~~ (especially if the king or public is entitled to a fine: — & it seems, tho' no fine is given to the king**) (c. 1 Bac. 37. 1 Com. 228-9. 2 Hawk. 377. 4 Co. 13. a. 12 Co. 134. Dy. 159. b. Cro. J. 134. 3 Bl. 151.

Ex. Stat. against scandalum magnatum — ~~So if stat. should prohibit private nuisance~~ — Stat. of Rec. & sale.

~~But if the stat.~~ the issue, to no humility or other respecting is ~~[illegible]~~ given against the Crown. Nota, 50.

* ex gr. the stat. of Rec. & Sale (St. C. 545. 229.)

** Hence is the propriety of laying the action qui tam, if the whole benefit of the judgt. c. to y.e prosecutor (cont. 50. 3 Bl. 151. Prick 2 Chitt. Pl. 157.)

Lex Scripta

See Lex in what cases - & c. commen.

If a Stat expressly allot a penalty to the party grieved by the offence; he may sue for it without joining the public. (1 Com. ~~229~~ "Action upon Stat." F.
So, I conclude, may any one where the whole penalty is given to the prosecutor. acc. 2 Chitt. Pl. 187

to

In Conn. actions qui tam are brought on the Stat against forgery, perjury, theft, breach of peace &c. (2 Swi. 183.

~~Generally, where a fine &c is given to the public or king & a civil remedy to party injured by an offence, the fine is inflicted of course on conviction in the civil suit; as the capitalia pro fine, at. com. law, in trespass. ~~in actions~~ (4 Bac. 11. 5 Bac. 191. 193. 2 Bac. 506. Sal. 636 Carth. 390. - Qu.~~

tho' the pros. is not qui tam

~~But, According to our practice, the fine is not inflicted in such cases unless the plff in the civil suit moves for it. By Stat. against defamation, breach of peace (Stat. 141. 336-7.), vexatious suits &c (Stat. 429.) and it is never done of late, in any case, I believe.~~

Municipal Law.

Debt on Stat. post 54.

If no form of action is prescribed for the recovery of Stat penalties; debt is a proper, & the most usual, action. (4 Bac. 653. Poph. 175. 3 Bl. 160-1); if the penalty is a sum certain. Is indebitatus assumpsit also proper? (vide Ep. 7. 2 Lev. 252. Carth. 92.) – ~~Tam~~ it is plain not proper; Decided to be a proper action in Conn. in an action (on the Stat against a city) I think in New London County.

It was held in a ca. in C. J. Indict. ex. to the Sup. Court in Eng. in such ca., & will notice that cit. Carth. 92 2 Lev. 252.

Qrs. in the King

If a penalty is given by Stat. partly to the king, & partly to the prosecutor; the king may prosecute alone for it. – He then has the whole. (3 Bl. 162. 2 Hawk. 268. fol. (275 or 392 fol.) 3 Inst. 194. 11 Co. 65. b. 66. a. 7 Y. R. 536.)

We have in Conn. a Stat. bro. in this of Qrs. that Com. may sue for it. C. St. 3 2. p. 184. 182.

For the part given to the prosecutor, it is allotted to him only to induce individuals to prosecute for the public. – Besides, the sum contributed to which the king is the prosecutor, the said entitled by prosecutor part.

Conviction in a q. t. a bar to both, Pros. & For no one can be twice punished, or tried, for the same offence

A bona fide conviction on a qui tam prosecution, by action or information, is a bar to any subsequent suit, & vice versa, to a public prosecution for the same offence. (3 Bl. 262. 2 Hawk. 276. fol. Cr. J. 480-2. 11 Co. 65. b. 66. a. 1 Bac. 41. 1 Com. action on Stat 2; & e converso. – So of an acquittal, bona fide. (2 Haw. 276. fol. This operates as an estoppel.

Lex Scripta.

Pendency of a qui tam action pleadable in abatement for a subsequent one

So the pendency of a qui tam action &c. may be pleaded for the same offence. It is said "in bar" of a subsequent prosecution, ~~& sup~~ (~~Qu. in bar or abatement?~~) 1 Bac. 41. Cro. E. 261. Hob. 209. 1 Rol. R. 49. 134.) Qu. In bar, or abatement?

In abatement. (2 Hawk. (391. 275.) 8vo fol.) 3 Bur. 1423

~~Note: A suit is considered as pending from the time of the purchase of the writ. — not from the time of return merely. (2 Hawk. 275 or 391. Cro. E. 677. Cro. J. 11. 5 Co. 48. a. 3 Bur. 1473. — vid. Salk. 89. 7 Co. 30. a.~~

~~In Conn. from the time of service. I believe. (Case of Fenderlin Tolland County. — "Plea & Pleadings". 1. 2.~~

Right of penalty how attached.

~~A person, claiming a penalty, or sum of money~~

Under a penal Stat. giving a penalty, or sum of money to any person, who will sue for it, no infant has any right attached in him, under the Stat. till action brought. (1 Bac. 37. 2 Hawk. ~~275~~ or 391. fol. 3 Inst. 194. 2 B. Bl. 310. 311. 2 Bl. 437. 2 Lev. 141. Pra. 1169. 3 Bur. 1423.

~~Power of a remedial Stat. (2 B. Bl. 311.~~

*It is otherwise as to a right given or taken in remedial stat. (2. 4. Tr. 311. post, 57.

Municipal Law.

But by commencing an action, ~~to~~ the prosecutor acquires an inchoate right not consummated till judgment. The Penalty, if before action brought, like property unoccupied, in a state of nature. (2 Bl. 437.

When the king may release, &c.

Hence, the king may bar the prosecution, by releasing the whole penalty, or by a pardon, before ~~the~~ action ~~be~~ is brought, by fine & judicial. (2 Haw. 275, for 392. octavo. 3 Inst. 194.

But after action ~~be~~ brought, the king can release only his part of the penalty:+ (2 Bl. 437. Cro. E. 138. 5 Co. 11. Co. 65. b. Hutt. 82. 3 Inst. 194. 1 Com. 229.) For a right of action is attached in the prosecutor, by the commencement of the suit.

+ Nor can the king in any way discharge, or suspend, the suit, as to the other part. (2 Hawk. ~~275 b~~ - 392. ~~fol. 2d~~)

+ They cannot release a right vested in an individual.

1 Tho' parliament, it is said, can release the whole even in this case. (2 Bl. 437.) Qu. on Scan. Jur. - ~~unless~~ except by repealing the law - the legislature cannot do it in any other way +

Lex Scripta

But ~~it seems that~~ the king cannot, even before action brought, bar the suit of the party grieved by the offence, where the penalty, or part of it, is given to him;— for as to him, the stat is altogether, or to a certain degree, at least, remedial. (2 Hawk. 276 (7th) = 392. (8th) Noy. 100. Mor. 58.)

— ~~His~~ The right is antecedent to the action brought.— 2 H. Bl. 311. (ante, 55.)

* In ye penalty is vindictive in its nature; it is still consid.d as remedial — so far, at least, as to preclude ye interposition of ye King.

When the prosecutor may release it.

The prosecutor in a popular action, it seems, might ~~also~~ at com. law release his part of the penalty, after conviction. (2 Hawk 276 (vol.) = 392 (vol.) (8th), 2 Rol. R. 33.) — The release in bar conviction wd be of no avail; for his ~~to the~~ ~~no complete int.~~ right is then not consummate, or ascertained.

+ And ye release wd bar a subseq. proc. by ye same, or any other, party, for ye same cause.

But, by stat 4 Hen. VII. no covinous recovery in a popular action, shall be a bar to a subsequent action be. brought by another individual:— And no release by ye prosecutor pending the action, shall be of any avail in such cases. (2 Hawk {392 / 276}. 3 Bl. 162.) This stat. is intended to prevent collusion in fraud of public justice.

Qu: Would not a covinous recovery, or a covinous release, be void at com. law? 1 Bur. 395. 3 Co. 77. Vin. Abr. tit. "vacat"

Municipal Law.

And by Stat. 18 Eliz. he may not compound the prosecution at all, till after answer made in Court, nor then without leave of the court, on pain of the pillory &c (1 Bac. 43. 2 Haw. ~~[illegible]~~ 397. fd. 1 Bos & Pu. 18. 5 TR. 98. Hr. 167.

And it is discretionary with the court to grant or refuse leave to compound. (Com. Dig. Action on Stat. E. 2. Hob. 79

On leave given, the king's part of the composition is to be paid into Court. 4 Bur. 1929. Com. Action on Stat. E. 2.

Even a bona fide release by the prosecutor would not at com. law, bar the king's right to prosecute: (2 Hawk. 275. 7. 8. Co. 55 b 56 a.); ~~This it would any under~~ (Ante 57. ~~at supra.~~) ~~2 Haw. 270 fd.~~ ~~idual, if given after conviction~~ ~~(1 Bac. 43 b)~~: Yes, if given after conviction, ~~before conviction~~, since in a subsequ. prosec. it may be waived. (Bl. Com. vol last — Rule is now altered. see Stat. 4 & 7. note.

+ After indict. leave to compound is seldom given, except on proof of debts, &c. (Com. Action on St. E. 2. Barnes, 402. Hr. 165.

Suppose the prosecutor practises fraud to defeat public prosecution; as by delay, that the Stat. of limitations may bar it, & then withdraws: would not he be punishable as for a misdemeanor?

If pltff in a popular action dies, releases, withdraws, or suffers a nonsuit; the public (king or state) may proceed in it, ~~Leave from the action is given to the jury grieved~~) — or commence a new prosecution. (2 Hawk (275 to 392. 3 ~~[illegible]~~ 8. 10)

Lex Scripta

11 Co. 65. b. 66. a. 5 Co. 48. b. 3 Bl. 162.

But where the action is given to the party grieved, & he dies, unless he (means ye action) is nonsuited the King cannot proceed in it. 2 Hawk. 392-3. (275. fol.) Ro. 58. Noy 100.) For the party part of the penalty cannot go to the King; nor can the King prosecute for his representatives, after his death.

Convictions Several.

If several are convicted in one inform.n upon a penal stat; several penalties are in some cases inflicted; in others only one.

Comyns. 510. 4 Bac. 2045. 4 Bac. 552-4. Bac. 184. 2 Com. R. 304 + 13. it is use ca. whether within ye gen.l rule or within ye exceptions, it is ye intention of ye legislature, ye ground.

Rule:- As punishm.ts are, in their nature, several each offence is liable to a sev.l penalty of course, except - 1. where ye penalty is given as a satisf.n by ye party injured by the off.e Co. E. 480. Sal. 182.

2. where, from the phraseology of the stat, a joint penalty appears to have been contemplated (2 East. 578. 4 T. R. 809. Sal. 182.) (# infra) as, by ye words, he, they, or they, shall forfeit such a sum.

+ Of course, if ye offe is committed by several & ye penalty several; debt is not a debt adapted to ye case.

Though however, one one bond to can be recov.d in several cts. - in reason of ye bonds of ye 3 cov.ts - debt being one & single. (Sal. 245. 2 East 509. 4 Bingh. 137.) - Ergo but one proceeding since recov.d.

~~Several acts may constitute but one offence: only one penalty in such case.~~ Ex. Labouring for a whole sabbath. (Comyn. 640.

Any no. of continued acts may constitute but one offence: of course, there can be, in such a case, but one penalty. Ex. Labouring, or travelling, for a whole Sunday (Comyn. 540.

~~+ (when there is but one offender).~~

Distinction in common acceptation between penalty & forfeiture or fine: 1st to an individual. 2d to public. (4 Bac. 653-4) 2n.

#3. And tho' ye language of ye stat. sh.d seem to contemplate ~~each~~ only a joint penalty - still, if ye offence was punishable at com.n law, ye all punishm.ts are regularly sev.l; ye. ye is suff.t ev.e ye a sev.l penalty was intended by ye legislature. ++

++ The stat. sanction being only cumulative. Sec. 3 (3) or substituted.

Municipal Law.

Costs.

In popular actions pltff in Eng. entitled to no costs; unless expressly given by the Stat. — Seems where the penalty is given to the party grieved, & he sues: For recovery of damages & costs.+ — ~~Because damages~~. (1 Bac. 42. 511. 519. 2 Keb. 781.

Rol. 574. Salk. 206. 1 H. Bl. 10. 2 Hawk. 274. fol.

Bullock 19. 200. 17. 201.

In Cont. the prosecutor always recovers costs, when judgt. is ag. defdt; & hence costs, if judgt. is ag. plaintiff.

+ So that what he receives is in the nature of a Satisfaction for damage sustained.

End of Municipal Law.

62

Of the Rights of Persons.

The subject matter of municipal law is divided into two general heads: Rights & Wrongs. (1 Bl. 122. 3 Bl. 1.) Its object is to guard & enforce the former, & to prevent or redress the latter. 3 Bl. 1.

Necessary that rights be first understood - wrongs being but privations or violations of right. 3 Bl. 2.

Rights are of two kinds: 1° of Persons; 2° of Things. (Wrongs also of two kinds: Private, & Public. (1 Bl. 122.

Persons as contemplated by municipal law are of two kinds: 1 Natural - 2 Artificial -- Natural are human beings considered in their natural capacities: i.e. ~~as formed by the God of Nature~~ - Artificial are such as are created by the law, & are called Corporations or bodies politic. Ex. Cities, corporate towns or societies - & other incorporated companies. (1 Bl. 123. 467.

Rights of Persons.

These derive their existence from the act or charter of incorporation. – Created to maintain a perpetual succession, for the purpose of perpetuating certain particular rights. (1 Bl. 467.

Of the rights of Persons, considered in their natural capacities.

These are of two kinds: 1. Absolute – 2. Relative.

1. Absolute are such, as belong to individuals, considered as individuals – such as belong to them even in a state of Nature. (1 B. 123.) These constitute what is called natural liberty. (1 Bl. 125.) – These rights (so far as their enjoyment is consistent with the preservation & welfare of civil society) are enforced by municipal law. (1 Bl. 123-5.

(It is obvious, then, that absolute rights cannot appertain to artificial persons, since they derive even their existence, & of course all their rights, from the institutions of civil society.

Rights of Persons.

The absolute rights of persons comprehend. – 1. The right of personal security – 2. Of Personal liberty – 3. of private property. 1 Bl. 29.

1 The absolute rights of persons, & the principles of law which relate to them, being few & simple. (1 Bl. 124-5.) I shall treat of them very briefly; giving only an outline of the law on the subject & refering to Blackst. & to the head of Wrongs, ~~1 Bl. 134.~~ for a more particular discussion of them (1 Bl. 134.

1 1st The right of personal security consists in the right of enjoying one's life – limbs – body – health – & reputation. (1 Bl. 129.

1 2d Personal liberty as here used consists in the power of loco-motion, i.e. of removing one's person from place to place, without restraints except by due course of law. (1 Bl. 134.) The right of personal liberty, then, consists in the right of loco-motion &c.

Rights of Persons.

3. The right of private property is the right of using, enjoying & disposing of, one's acquisitions, without control, except by the laws of the land. 1 Bl. 138.

The right of private property is founded on natural law; its modifications as the tenure, by which it is holden, & the method of preserving & transferring it, are derived from society. 1 Bl. 138. 2 Bl. 3. 8.

II. The relative rights of persons are those, which grow out of the relations of civil society - or such as belong to individuals, considered as members of civil society. (1 Bl. 123. 146.

The civil relations from which these relative rights result are either public or private. (1 Bl. 146.

I. As to those relative rights, which arise out of public relations, see 1 Bl. 146. & ultra. Ex. of governors & governed - magistrates & people.

Rights of Persons.

II. The private relations, from which relative rights & duties result, are the four following:

I That of Husband & Wife
II That of Parent & Child
III That of Guardian & Ward
IV That of Master & Servant

These are called ye Domestic Relations.

Of Husband & Wife.

1st Of the rights & duties resulting from the relation of husband & wife.

Marriage is regarded by com. law & our own, as a civil contract. (1 Bl. 433.) – Husb.d & wife are regarded as But one person in law, to many purposes.+ 1 Bl. 422.
– Of ye legal effects of ye marr.e contr.t
1st First,

+ The forms & requisites of ye contr.t will be considered in connexion with ye mode of dissolving it – viz, ye law of divorce.

Of the consequences of marriage as it respects the husband's right to the wife's estate.

His right to ye prop.y

The general principle, by which the law, as to this branch of the subject is regulated, is founded on the husband's duty to maintain & protect the wife; & her estate is so far his, as is supposed necessary to enable him to discharge this leading duty.

I. Of wife's personal chattels in possession.

This in general, is by ye common law, ~~(principle [illegible])~~ a absolute by vested in the husband by marriage.* (2 Bl. 435.

* For ye exception in the case of paraphernalia of the first kind, see post,

Husband & Wife

A's right to wife's prop.y. Posses.n in ... &c.

He may dispose of it at pleasure, & may bequeath it. (1 Bac.t 289. Co. L. 351.

If he dies intestate, before the wife, it goes to his ~~[illegible]~~ adm.r. (1 Com. 555. 1 Bac. 289. Co. L. 351. b.

But he has no beneficial interest in ~~[illegible]~~ personal property, which wife has in auter droit: Ex. what he holds as ex.t (Co. L. 351. 1 Bac. 289.

So also, husband is entitled to the personal chattels of the wife acquired by her during coverture. (1 Com. 555. 1 Bac.t 290. Salk. 115. (post, 53) Ex. Legacy.

To the avails of her labour. (1 Bac. 290. 292. Esp. 127. Salk. 114. *

* As to ingrafting, & P's rights under y.e stat. of distributions accruing to her, during cov.e See post, N.o 2, p. 82 & 3.

II. Of Wife's personal property in action, - or, choses in action.

Of this husband may dispose at pleasure, during their joint lives (~~or even be~~ Co. L. 351. 1 Bac. 289. Bailey &c. 1 Com. 556.) - ~~during joint living~~ Ch. 110. Sh. 516. 3 Wils. 55.

post, 13.

But, reducing it into possession, or some act of ownership equivalent to it, necessary during their joint lives to give husband an absolute title:* otherwise it survives to her, on his death. (Ch. 2.

* Unless he has purchased y.e by a settlement. post, 75.

Wife's Choses in action. contd.

Her right to sue jointly with husband in actions.

~~Prec. Ch. 209.~~ And would go, it is said, to her representatives (the survivors) on her own death, but for the Stat. 29 Ch. II infra. (1 Bl. 515. 1 Roll. 342. Moor. 352. 3 or 2 Mod. 186. 2 Bac. 428. 1 Bac. 289 1 Show. 25. Chit. Pl. 21. 2 Bl. 435. Salk. 173. Prec. Ch. 209. Com. D. Bar. & Feme, E. 3.) – Sed qu.

• He losing it is st. all title, in this case, as husband. (2 Bl. 434-5.) Sed qu. & sed v. p. 74.)

But by Stat 31. Ed. III. & 29 Car. II. ~~(2 Bl. 434)~~ he may take it as adminis. Chit. Pl. 21. 2 Bl. 435. Foll. 83. 4. 373. 1 Ld. 44. Sal. 36. =

~~Not liable in Eng. to account to her representatives.~~

For, By Stat 31. Ed. 3. administn in case of intestacy, in general, was given to the next of kin most beneficial friend; who (in case of wife's dying) ~~husband~~ was construed to be ~~(1 Roll. 911.~~ the husband. (1 Rol. 910. Foll. 84. Sal. 36. 1 Ld. 44.)*

Other hold, v. it has, v. right to administer, jure mariti, at Com. law, & no statute any stat. (Foll. 84. 3 Ld. v. 245. Com. D. Adm. B. 5. 2 Bl. 515. 4 Co. 51.) Sed qu.

* The stat. 21 H. 8. directs adm. to be given to the widow or next of kin. Foll. 35. 2 Bl. 504.

* For by v. Last Stat. ~~By Stat. 29 Car. II.~~ v. husband as adm. not liable to account w. her representatives; (2 Bl. 515. Foll. 373. 1 Bac. 289.) i.e. not liable to creditors as a legacy. ~~Not such stat. now.~~ – And thus he may hold v. jure, 29 Car. II, not liable to acc.

No such stat. in C. & no such right in h.

• ~~No such cap.~~ In comm. adm. in ca. of intestacy, goes to next of kin, in the first instance (Stat Com. 165.); & there no special provision for intestacy of wife here. ~~I mean at Com. law. Qu. Tho. in the stat. 22 Car.~~

* At any rate he has v. right, by v. exp. provi. if v. Stat of frauds, 29 Car. 2. c. 3. v. 25. Foll. 55. 373.

Husband & Wife.

[illegible] to his order. Chose in action.

~~Hil. 4. Bl. 215. That at Com. law they belonged to the husband. Therefore husband her is supposed to have no such right, 2 Bl. 515. (proved that under the Com. law of intestate ests.)~~

And our stat. com. has distributed, by [illegible] in her husband's favour.

+ During her life, unless he has exercised a[illegible] by a settlem[illegible]

He cannot, ~~during~~ wife's chose in action,+ (Co. L. 351. 1 Bac. 29.) For [illegible] it is not a disposition w[illegible] also effect in her life-time; it is not a devising p[illegible] to pass.

(Nor Hal. comb. is distribution without any exception in husband's favour.)

But tho' in Eng. he is not bound, as adm[illegible] to distribute her chose in action, he is still liable, as adm[illegible] to pay her debts ~~(Co. L. 351.)~~ out of them, ~~chose in action~~. (Co. L. 351.) They are [illegible] in his hands, or his [illegible] here.

And even if [illegible], on husband's neglect, is appointed adm[illegible] as next of kin, husband is entitled to her personal property, ~~[illegible]~~, after payment of debts ~~in Eng.~~ (3 Atk. 526. 1 Atk. 165. 1 P. W. 381.) ~~[illegible]~~ Atk. 373.

~~[illegible]~~

And this right, it has been held, is transmissible to his representatives: so that if he dies before taking adm[illegible] his representatives will take. (1 P. W. 381. 2 Atk. 526.) But it is now held that her rel[illegible] are, by stat. 31. Edw. 3. entitled to adm[illegible] [illegible] they are trustees, for [illegible] in eq[illegible]. (Gall. 115. 1 Wils. 109. 1 P. W. 382. n. 1.

Ex[illegible] 4. 20.

Wifes choses in action. Contind.

As right to [illegible] choses in action.

A Settlement by husband on wife is said to be, in equity, an absolute purchase of her choses in action; so that he not only has them if he survives; but if he dies first, transmits them ~~them go~~ to his representatives. (Pr. Ch. 63. 312. 412. ~~3 P. Wms. 199 n.~~ 2 Vern. 501.) He being considered as a purchaser of them, by the settlement.+

+ When he is a purchaser, under ye. rule, he & his reps. will hold, I suppose, even agt. her creditors.

~~2d. Unless an express or implied agreement. 2. Vern. 64~~
~~4 Vin. 40. Pr. Ch. 209. Ambl. 692.~~

But this rule does not hold, it seems, unless there is an express or implied agreement to that effect: as, if the settlement is expressed to be in consideration of her fortune: (Ambl. 692. 3 P.W. 199. n. Pre. Ch. 209. Vin. 40. 2 Vern. 64.

+ In ye. ca. ye. w. being in ye. h's power, her agrt. will not bind her, unless justice is done her. post, 83.

But if the settlement is made after marriage, it must be adequate — Semb. it is not a purchase, even tho' so expressed: — At least, not of the whole.+ (Rob. Fr. Conv. 285. n. 2 Atk. 448

Arrears of rent, due to the w. while sole, become exclusively the husband's on marriage. (1 Chit. Pl. 21.) But this is by stat. 32 H. 8. (2 Bac. 17. 2 Bl. 434-5. — Post, 85.‡

‡ At com. l. they [illegible] other choses in action [illegible] 2 Bl. 435.

If a debtor of the wife be sued, & judgt. obtained agt. him by husband & wife, ~~are~~ they are joint-tenants of the judgment. (1 Mod. 179. 3 Ib. 189. 1 Bac. 293. B. & F. 1 Vern 396. 1 Com. 555. 557. Sid. 337. 1 Com. 576. For by ye. judgt. ye. claim, becomes ~~[illegible]~~ [illegible] a debt, jointly in h. & w.

If either dies before collection; the jus accrescendi, wh. obtains in Eng., vests ye. whole in ye. survivor. — (not in Conn.) ~~Hence what is to the wife according to [illegible]~~ 1 ~~2d~~. 1 Chit. Pl. 21. 3 Mod 189. Notes g. h.
Hence, ~~as some have supposed or~~ the whole goes to the wife, or her representatives, on her dying first; 2d. For ye. judgmt. converts ye. claim into a joint debt to ye. hd. & wife.+

+ And by our law each transmits his or her part to his or her reps. Semb.

Husband & Wife

4's right to wife's choses in action

But ~~in~~ in Conn. the right of collection in such cases is in the husband, if he survive, tho' subject to account, ~~if he survive~~ as in common cases of partnership rights, a joint claim.

And he may sue out ex.ⁿ on fi. fa. in his own name. 1 Chit. Pl. 21. 1 Bac. 293. Ind. 208 Sel. N. P. 1 Bro. Parl. 415. 1 Atk. 337.

5 John Ch. 196

Husband may assign here choses in action for valuable considerations, but not without consideration ~~otherwise not~~ (3 T.R. 94. 2 Ath. 208. 420. 1 Fonbl. 308. 3 P. W. 199. Rob. Fr. Conv. 295 1 Bro. Ch. 44.) For an assignment of choses in action is equitable int.ᵗ, a voluntary assignment being inequitable as to the wife; a court of Chy will not enforce it for the purpose of transfer, but a court of law cannot: The int.ᵗ not being assignable at law.

But a voluntary assignment, tho' void ~~as to the assignee~~, has been holden, as an act of ownership, to change the property by vesting it in the husband. (Rob. Fr. Conv. 295. 1 P. W. 380. But this is not law. (Rob. 295. 2 ath. 208. 1 Br. Ch. 44.

He may, however, release her choses in action without consideration 2 Atk. 208. 1 Fonb. 308. For he has a legal power over them, the release must operate at law, & equity cannot set it aside. (vid. post, 80.)

~~Release without consideration 2 Atk. 208. 1 Fonb. 308.~~

If h. is obliged to resort to equity, to obtain the wife's choses in action, the court will not in general interfere in his favour unless he will make a reasonable provision for the wife.

~~But~~ If husband assigns them for value, the assignee is liable, in equity to same obligation as husband to make a provision for the wife. (Rob. 291-4. 1 P. W. 382. 251. 458. 3 Ves. Jun. 506. 15. 4 Bro. Ch. 326.) The court of equity will not interfere in favour of the assignee, before marriage.

+ & a court of law cannot: The int.ᵗ not being assignable at law.

‡ Such a rule would be as inequitable, as to allow a voluntary assignment to hamper ~~the~~ int.ᵗ, against her claims.

+ Equitable interest in action being discretionary. 1 Atk. 251. 382. 458. 3 Ves. Jun. 506. 15. 4 Bro. Ch. 326. (See 10 L. & S. 93.) Rob. Fr. Conv. 280-8.

Wifes choses in action — contin.d

Not liable to wife's debts } Not liable for husband's debts after his death, living the wife (1 Bac. 289. Co. L. 351.); so if, bro. entered in a recognizance, as before stated.

Not to be taken in execution, ~~nor in living~~ by his creditors, during his life: For they are not his, Ibid. Being a chose in action is not liable to ex.n

Goods of a feme sole, in possession of another by bailment, or finding, are, on her marriage, the husband's absolutely; & he may sue alone for them.‡ (1 Bac. 289. 1 Rd. 172. Marr 25. 1 Vent. 261. 1 Keb. 344. 1 Ld. Raym. 175.) For these are not considered as choses in action. See Bailment, 103. } Therefore husband, & not the bonafide owner, hot.d (Esp. R. 570. 4 T.R. 455. 1 Bulst. 68.) The poss.n of bailee &c. is her poss.n

Alien, if they are converted, ~~[illegible]~~ before marriage. (3 T.R. 631.) She must sue jointly in the action: For her right, at the time of the marriage, too — it is plain lone, is in a action only.

Whether in the first case, husband alone can maintain trover? (1 Sid. 172. 3 T.R. 631.) What case is the object in question, indeed? For the rights of the bailee or finder, or the owner, it is not material: the wife's rights, so that she might be entitled to a chose in action at the time of the marriage. ~~Yet husband may demand 1 Sid. 172.~~ ~~It seems not, if the wife alone in possession. See Marr. 25. 1 Bac. 289.~~

~~Voluntary conveyance of property, by the wife before marriage, are sometimes adjudged fraudulent, as against the husband. Ex. (Woman on the point of marrying without his interest, husband's expense) makes a voluntary conveyance to a mere stranger. (1 Ambl. 259. 2 Ves. 264. 2 Ven. 17. 2 P.W. 545. Ibid. 1 Atk. 99. Bro. Ch. 345.~~

‡ This rule supposes, if bailee has no right to retain against bailor: If so, if has such right, assignee of notes not sign, till if has ceased. Post, n.o 2, p. 59.

for a conversion subsequ.t to if marr.s

Husband & Wife.

* It's right to wr. prop. chose in action

Reus. if made to provide for her children by a former marriage. 1 Ford 259. Vern 408. 2 P. W 358. 1 Atk 265. Comp. 705. 1 Bac. 297. Comp 780. Rob. Fr. Conv. 351 & Atk. 358. 9. (Fraud. Conveyances. p. 16-18.)

A contract by wh one is bound to the h. to pay money to the wr. is subject to his control, not to hers. The may receive y.e money, as it becomes payable, but cannot discharge* (3 East 331.) For the cont.t gives the w. nothing more than an authy to receive y.e money. This she may do; as payment to her, (is perform.e

* the contract

III Of wife's Chattels real.

Chattels real are such personal property, as savours of the reality; ~~Leases 2 Bl. 385.~~ as terms for years, mortgages, &c (2 Bl. 385.

* Over them, upon vesting in the wife, the husband has a more extensive right than over her choses in action.

The chattels real of the wr. are liable, during their joint lives, for payment of his debts, & to be taken in execution. the choses in action are not so. (1 Com. 554. Co. L. 46. 351. 1 Rol. 344. 4 T. R. 638 9.) For such a chattel is a kind of prop, liable to ex.tn, if y.e ex.tr. suppose in y.e wife, legal, & in eqty.

* If y.e Husband is only possessed only in the wife's right, y.e interest continues in her, unless he disposes of it. — ~~if she survives~~. 1 Rol. 342. Co L. 351 a. 46. b. 300. a. 2 Bl. 434-5. Amb. 693. 3 P. W. 197. 1 Rol. 345. 1 Com. 554.

Wife's Chattels real.

Husband's right to dispose of chattels real.

~~Goes to survivor~~. Husband has right to dispose of them absolutely, during their joint lives. (Pr. Ch. 418. 2 Bl. 434. Co. L. 46. b.) ~~Contra by Chittenden v. Chittenden 1801 Litch. Co.~~ — H. & W. being considered as one in joint tenants. (Co. L. 351. Sha. 510.)

But it has been resolved in Con. that on the wife's death leaving the h. they go to her representatives: the rec. exception being unknown to our law. (Countess Chittenden, 2 Ch. 33.)

In Eng. neither h. nor w. can devise them. (Pr. Ch. 418. 2 Ven. 270. 2 Bac. 285. 2 Bl. 434. Co. L. 351. a. 1 T. Bl. 538. arg°. 1 Com. 554.) For the right of the survivor is prior & paramount to that of a devisee. Besides, its legal validity wd. under his dev. void.

But by act executed, during their joint lives, husband may dispose of them — to vest in possession, after his death. —

For present
Here a right of future ~~enjoyment~~ passes instanter. (Co. C. 237. 1 Rol. 344.) & that the transfer comes within the description of a disposition during ye. coverture: whereas a devise vests not inst. till the testator's death.

~~Not so by devise which vests no right till devisor's death.~~

Not liable for husband's debts, after his death, if the w. survives. (1 Rol. 349. 1 Com 555.) For the wife's right by survivorship intervenes: devise as ye h. pleases of course not by will, made them subject to his debts; the act of his creditors after his death, cannot subject them.

Nor in Eng. are they liable for wife's debts, if she dies first. — ~~yet a person under protection~~ The h.'s right by survivorship excludes her creditors. — But according to the doctrine (~~London~~) in the case of Countess Chittenden (Cybrae) ye. rule in Con. must be diff.

If a feme sole, joint tenant of a chattel real, marries & dies, the whole goes to the other tenant. For his title is prior to the husband's. (1 Bac. 287. 1 Lord. 418. Co. L. 185.

But the h. has, during coverture, ye. same power to devest the tenancy by an actual disposition of the moiety, as she had, while sole. Ibid.

3 Bac. 209-210. Litt. p. 285. Co. L. 184. b.

2 Ab. 434 n. 5. 3 Bac. 209-210. Litt. p. 285. Co. L. 184. b. d. Joint Ten. & p.

Husband & Wife

H's right to w's prop.

Lectures real.

+ i.e. eq. cannot set it aside v. assignm.t

He may, during coverture, assign them, even in equity without consideration:+ (Rol. Tr. Conv. 299–301. 1 Ven. 7. 18. 1 Ch. Ca. 306. 3 P.W. 39. 2 Ven. 270.) For the legal title is at his disposal; and chancery cannot control his right to dispose of it. (vid. ante, 76.) — He is under no necessity of resorting to eq., to enforce his title to yr. prop.

IV. Of the Wife's real estate of inheritance.

Real estate.

~~Of yr. wife's real estate, yr.~~ Husband has yr. sole usufruct during coverture. But he cannot, at com. law alienate his poss. alone: nor bring ne cessary to suppose not being necessary to ~~endanger the inheritance, to divest the husband of yr. family, to the husband, the governing principle~~. (1 Bac. 286. 300. 1 Sid. 11. 1 Rol. 347. 2 Inst. 510. 1 ~~Bac. 286~~. 10 Co. 42.+

post, n.o 2, p. 48.

Nor can husband & wife, by their joint act alienate inheritance, except by fine or common recovery. (1 Bac. 301. 2 Inst. 515. 1 Bl. 444. Sit. dec. 669. 670.

~~Lang~~ 2d. Comm.t (~~Stat. Com. 265.~~) it may be done by their joint deed. (1 Bl. C. ~~265~~ 444-5.) So, in N.Y., she being privately examined, as to yr. custom of her act.

post, n.o 2, p. 28. & 47.

By Stat. 32 Hen. VIII. husband & wife are enabled to make leases of her fee-simple, or fee-tail estate, for 3 lives, or 21 years. (1 Bac. 309. 310. Co. L. 22. 378. 5 Co. p. 2 Saund. 180. n. 9.) Such leases are, therefore, valid during yr. term, tho' yr. w. or h. shd. die before yr. expir.n of it.

Wife's real estate.

Hs right to wife's real estate } If husband during coverture grants a larger estate than for his life, in wife's land, thus no forfeiture of his life-estate; as in other cases of ~~particular~~ tenants for life (Lit. sec. 415. p. 594. 2 Bl. ~~273~~. 274. 9 Co. 140. 1 Bac. 301. 2 Inst. 681. Co. L. 326.) For the coverture disables her to claim the estate, during his life: and if forfeited to her, yt. usual rights wd. immediately re-attach upon it.

But it will enure only as a grant for his life, at most, & possibly for less; as the wife may die, & he not be entitled to curtesy. (1 Bac. 301. Co. L. 326.) – [Suppose he dies, under circumstances, wh. would entitle a tenant to curtesy: Has he, in his, or her death, claim to be heir? I suppose, not – yt. grant not being, strictly, a forfeiture.]

On his death, in her life-time, her real estate reverts solely in ~~the~~ her. – On her death, the fee vests in her heirs: but yt. husband, in case of a child born alive of her, capable of inheriting yt. estate, has yt. estate for life in the whole of which she died seized, by yt. curtesy of Eng. (2 Bl. 126. Litt. sec. 35. 52. 1 Bac. 659. Co. L. 30.

Mortgages, 32. } He is entitled to curtesy in the wife's equity of redemption in fee – tho' it is only an equitable int. of wh. he cannot be actual seisin. (Pow. Mc. 112, 115. 1 Eth. 503. – Post, ch. 2, s. 2.)

" In gavel kind tenures, husband has curtesy without having issue. (2 Bl. 128. Co. L. 30.

Stat. C. S. 432. " Our tenure of lands, by yt. charter of Car II, is according to that of gavel-kind. But ~~This kind of curtesy was adopted here~~ = But curtesy, under such circumstances, has never been allowed, here.

Husband & Wife.

Hus's rights terminate with death.

Real est.

Since the ~~revolution~~ revolution, estates have been deemed allodial. (Stat. 253) ~~no con~~ Staff. 5. 432. 433. 434. ~~by the Common L. of England~~ 2 Bl. 127.

· There can be no estates in a remainder or reversion. For these the w. does not die seised. (2 Bla. 27.

· Tenants' r. to courtesy the Seisin of the wife must be actual. ~~seisin in possession~~. (2 Bl. 127. Co. L. 29.); except in case of some incorporeal hereditaments, equitably or redemption. (2 Bl. 130. Co. L. 29. — vide Ch. 2. 6. 1.)

But it has been determined in Con. that actual seisin is not necessary, & that a right of seisin is sufficient (4 Day, 295.

· To entitle y. h. to courtesy, the marriage must be legal. — Issue must be born during the life of the mother. (8 Co. 35. 1 Rev. 659. 666. Plow. 263 Co. L. 30 = 29. 2. Bl. 127.

(Tenant's issue inherit in preference to husband by the curtesy.)

By the birth (as supra) husband is tenant by the curtesy initiate — title consummated by wife's death. 2 Bl. 25. Co. L. 30.

Tenant by curtesy in Conn. — Decision 25 or 30 years ago — tenant only during minority of the issue. But husband not entitled in favour of collateral heirs — No later decisions. Usage. — Late decision contra. i.e. that husband should hold by the curtesy during life.

Wife's right to her Book of Real estate.

Wife's real estate.

ante, 75. 2. 3. post-12. 2, p. 60.

All com. law arrears of rent, due to wife while sole, would not survive to husband on wife's death. (4 Co. 51. a. Co. L. 162. a. b. 351. a. 7 Bl. 435.) They would go to her executors; being in nature of chose in action, belonging to her, while sole, & not reduced to poss.n by husb.d

But by stat. 32 Hen. VIII they are given to husband. They vest in him on wife's death & go to his executor & c. on his death (2 Bac. 17. Co. L. 351. a. 1 Phil. R. 21. & post, no 2, p. 57.) + ante 75.

n. 2. p. 60. ante, 75.

Rent accruing out of wife's property during coverture, goes to the survivor, at com. law. (Co. L. 351. a. 1 Com. 557. 576 Amb. 692. 1 Roll. 350. 2 Bac. 17. 4 Co. 51. Co. L. 162. b.) = ~~(This rule is a part of the law of accruing rents, & not of the law of vesting of a chattel in a husband, & the following cases, which are in point, p. 92.)~~ = This not being within ye above stat. 32 H. 8.

(Wife can have no sole & separate property at com. law (1 Pow. C. 103. 1 Fonb. 94-5. 1 Atk. 270.) - i.e. none, exempt from marital claims. - This rule requires qualification, as regards paraphernalia of ye first class.

Now, a gift to her sole & separate use, is protected in Chan. cery as to the claims of the husb.d (1 Pow. C. 444. 2 Ves. 191. 605. 1 Fonb. 97-98. 2 P. W. 315. 319. 1 Atk. 126. 1 Bro. B. 94-5. 1 Atk. 271.

2 Vs. n. 2. p. 4. 2 P. 385. & note.

To property thus vested in the wife, the husband has no right by curtesy, or otherwise.

post, ~~[illegible]~~. 25.

Over such property she may exercise as absolute a power, in equity as if sole; except that she cannot directly devise it, if real, by Stat. 32 Hen. VIII. (1 Pow. 444. 1 Fonbl. 87. 98. 102-3 90-1. 3 Atk. 393. 1 Atk. 270. 3 P. W. 337. 3 Atk. 695. 1 Ves. 303 6 Bro. P. C. 156. 2 Vern. 748. 2 Ves. 191. 663. 2 Ves. 57. 165. 166. Com. Dig. Baron & F. 1.

Bar. for the man to a disposition by way of trust, upon a use, viz. post n.o 2. p. 40-41.

Husband & Wife.

His right to wife's prop.
Real estate

Husband cannot, by his dissent, defeat a gift to the sole & separate use of the wife.+ Tho' he may, in common purchases. (Co. L. 3. a. 356. 1 Bar. 303. 1 Com 556.

+ For to give effect to ye transfer, there must be mutual assent of parties.

But ye wife, after coverture, determined, may assent to, or waive, an benefit; the gift is voluntary. For in fact, there is no dissent. 1 Co. 3. 44. Co. 3. a. 356. a. Bacon 435. Com. 1 Salk. R. Eq. 294. (# # if)

~~Intermediate the letter marked (+) 1 Bro. 6. 34.~~

For a consent to an, ye seal not, Co. L. 3. 356. b. 2 Bl. 292-3. Com. Bacon Ab. 23 - For ye wife cannot, upon her, no act is necessary to its vesting; it cannot, however, be revested.

After the gift ~~may have~~ was first allowed to hold separate property, unless ~~[illegible]~~ were thought necessary to stand seized to her use (1 Fonbl. 98. 99). - Not so now. 1 Fonbl. 94-5. 1 Ath. 270. 3 P.W. 334. Wms. 245. 1 P.W. 120. 2 Atk. 73.

Ante p. 6. 38.

Sub. Property real or personal may be given now directly, to her sep. use, to her even before marriage or after, by husband, as well as other.# (1 P.W. 126. 2 P.W. 79. 316. 1 Atk 270. 5 J.R. 434. 3 J.R. 618. 2 Ves. 665 1 Pow. 6. 444. 1 Fonbl. 94. ~~Ritt 15. 28.~~ 1 Fonbl. 95-98.

In such cases ye estate has been holden to be a trust in ye husb. (3 Atk. 399. Brook. 187. 1 Fonbl. 98.

Her representatives have ye same right, if after cov. she did not make her election (Co. a. 3. a). - If ye h. mortgages, or disposes of her purchases, during cov. (Com. Dig. Bacon Ab. (P. 2. Co. a. 3. a) For she cannot bind herself by, in ~~[illegible]~~ dispos., till after cov. determined.

~~[illegible]~~ It has been holden, that if a feme sole possessed of a trust-term to her separate use, marries; her interest in it vests in the husband jure mariti. (1 Fonbl. 98. 1 Vern. 7. 18. 2 Atk. 270. 2 Atk 421) - 2 Bro. Ch. 345. Cont. Co. L. 3. a. n. 1. 112. 4 Co. 29. Wms. 18.) - 2d. On what prin.? ~~[illegible]~~ 2 Bro. Ch. 345.

Tho' convey. to a woman before marriage, sometimes a [illegible] in equity, yet, as ye [illegible] of marriage, the husband cannot convey. without her intermediate bounty to a stranger. 1 Fonb. 257. 2. Ven. 2 P.W. 385. 2 Ch. 2 Sand. 1 Fonb. 39. 2 Bro. Ch. 345.

in Frant. Conv. 1. 8. } Aliter, if made to bar wife & her children by a former marriage. 1 Fonb. 259. 1 Vern. 404. 2 P. Wms. 358. 1 Salk. 265. Cowp. 705. 1 Bac. 292. Rob. Fr. Con. 351–359.

Of the Wife's right to the Husband's estate.

Person.E by 1 & 2 Vict. c. 26. I. In Eng. & Conn. (under the Stat. of distributions, 22 ~~29~~ Car. II. – Stat. Conn. 165–6.) if husband dies intestate, leaving issue, the wife has one third of his personal property absolutely: If no issue, one half, if debts of husband being in both cases first paid. (2 Bl. 515. 2 Bac. 427–8. – post, No. 2, p. 1.

Real est.e Dower. II. Dower. At com. law ~~(Litt. §. 36)~~ the wife is entitled, on his death, to a life estate in one third of all the husband's inheritable estate, of which he ~~husband~~ was seised at any time during coverture, & which any issue, that she might have had, could have inherited. (2 Bl. 129. 131. Litt. §. 36. – Vid. Estates for life). – This life-est.e is called Dower.

post, No. 2, p. 4. The Husband, at Com. law, cannot, by alienation, bar her of this right. – To bar her, she must join in a judicial conveyance. ~~in deed~~ ~~&c.~~ ~~& by in a deed~~ (2 Bac. 139. 2 Inst. 349. 2 Bac. 140. 10 Co. 49. Plowd. 515.

In what cases wife having covenanted to procure her to join in a line of his lands & compellable in eq.y to perform the covt. specifically. 3 P. Wms. 189. Shelb. 95. Ac. Ch. 76. 5 Ves. 446. 7 Ves. 474–5. 8 Ves. 505. 514. 3 Wils. 189.

In N. Y. & Ala. the wife may bar her right, by joining the hus.d in a deed.

The ques.n is in Cont. vid. post No. 2, p. 1–2.

Husband & Wife.

W's right to 1/3 Book 4. Dower.

She is entitled (not having barred herself as before), to Any issue, which she had, or might have had, could inherit the estate. If any issue she might have had, could not inherit, it Ex. — Donee in special tail. (2 Bl. 131. Litt. sec. 53. (For the following index, see Book 4. sec 4 & 54 in Dower.)

post, n. 2, p. 84

But she must have been the actual & lawful wife at the time of his death. — Hence At com. law, Divorce a vinculo, takes away the right. (2 Bac 130. 7 Co. 70. 5 Co. 98. 1 Rol 681.

post, n. 2, p. 84.

Divorce à mensâ &c. does not (Co. L. 32. 33. b. 2 Bac. 130. Noy. 108. Cr. C. 463. 9 Co. 19. 3 Com. 127.) For the marriage is not destroyed by such a divorce.

If husband dies, before the age of consent, the wife still to be endowed. (3 Com. 128. Co. L. 33. a. 40. a.

But she must be above the age of 9 at husband's death (3 Bl. 131. Litt. sec. 36. Co. L. 33. 3 Com. 128.

Wife has dower however old she may be ~~(be above 100~~ at the marriage (3 Com. 128. Co. L. 40. a. 1 Rol. 675.

See Herb. Book.

p. 64. - 2u. de ferme solés <u>tout-term</u>